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No. 01-___

In The

Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GARY BRADFORD CONE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL E. MOORE
Solicitor General

AMY L. TARKINGTON
Deputy Attorney General

JENNIFER L. SMITH
Assistant Attorney General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 20207
Nashville, Tennessee 37202
(615) 532-7911

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I.

By applying a *de novo* standard of review to a habeas petitioner's ineffective assistance of counsel claim, does the court of appeals' ruling conflict with *Williams v. Taylor*, 529 U.S. 362 (2000), which set the standard of review under 28 U.S.C. § 2254(d)(1) for granting habeas corpus relief to state prisoners on claims that have been previously adjudicated on the merits in state court?

II.

May a federal court of appeals bypass the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), and presume prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), to find a violation of the Sixth Amendment right to counsel, where defense counsel conducts a thorough pre-trial investigation, presents lay and expert witness testimony in support of a mental health defense at trial, conducts direct and cross examination, and addresses the jury at both the guilt and sentencing phase on behalf of his client, and where the state and district courts have previously determined that the defendant demonstrated no actual prejudice from any deficiencies identified in the attorney's performance?

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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PETITION FOR WRIT OF CERTIORARI

The Solicitor General of the State of Tennessee in the Office of the Attorney General, on behalf of Ricky Bell, Warden, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit reversing and remanding this case to the district court with instructions to issue a writ of habeas corpus vacating respondent's two death sentences for first degree murder.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1) is published at 243 F.3d 961. The memorandum opinion of the district court relevant to Cone's ineffective assistance of counsel claim (App. 39) is unreported.

JURISDICTION

The judgment and opinion of the court of appeals were entered on March 22, 2001. (App. 1). Petitioner's timely request for rehearing was denied on June 1, 2001. (App. 12). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2254(d) provides in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

STATEMENT OF THE CASE

I. Procedural History

Respondent Gary Bradford Cone ("respondent" or "Cone") was convicted by a jury in 1982 in the Criminal Court of Shelby County, Tennessee, for the first degree murders of Shipley O. Todd and his wife, Cleopatra Todd, on August 10, 1980, in their home in Memphis, Tennessee. In the same trial, he was also convicted of three charges of assault with intent to commit first degree murder on three other persons and of robbery by use of a deadly weapon upon a fourth. The jury sentenced Cone to death for each of the murders, finding unanimously the following aggravating circumstances: (1) that Cone was previously convicted of one or more felonies, other than the present charge, involving the use or threat of violence to the person; (2) that Cone knowingly created a great risk of death to two or more persons, other than the victim

murdered, during his act of murder; (3) that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (4) that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. Tenn. Code Ann. §§ 39-2-203(i)(2), (3), (5), and (6). The Tennessee Supreme Court affirmed the convictions and sentences, *State v. Cone*, 665 S.W.2d 87 (Tenn. 1984) (App. 84),[1] and this Court denied certiorari. *Cone v. Tennessee*, 467 U.S. 1210 (1984).

Cone subsequently filed a petition for post-conviction relief, contending that he received ineffective assistance of counsel at his criminal trial. Following an evidentiary hearing, the Shelby County Criminal Court entered findings of fact and conclusions of law denying relief. The Tennessee Court of Criminal Appeals affirmed the judgment on November 4, 1987. (App. 101). The Tennessee Supreme Court denied Cone's application for permission to appeal, and this Court denied certiorari. *Cone v. Tennessee*, 488 U.S. 871 (1988). Cone filed a second post-conviction petition, but relief was denied, and the dismissal was affirmed on appeal. *Cone v. State*, 927 S.W.2d 579 (Tenn. Crim. App.), *cert. denied*, 519 U.S. 934 (1996).

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[1] The Tennessee Supreme Court found that the aggravating circumstance under Tenn. Code Ann. § 39-2-203(i)(3) (risk of death to two or more persons) was inapplicable to an extended criminal episode, such as the one here. But because the jury clearly found three other aggravators, the Court found that any error with respect to the (i)(3) circumstance was harmless beyond a reasonable doubt. *Cone*, 665 S.W.2d 87. (App. 98).

On July 1, 1997, Cone filed a petition for writ of habeas corpus in the United States District Court for the Western District of Tennessee. On May 15, 1998, the district court entered an order of partial dismissal of Cone's claims, rejecting, *inter alia*, Cone's claim of ineffective assistance of counsel during the sentencing hearing of his trial. (App. 39). On January 29, 1999, the district court dismissed the remainder of Cone's claims.

In a decision filed March 22, 2001, the United States Court of Appeals for the Sixth Circuit reversed and remanded the case to the district court with instructions to issue a writ of habeas corpus vacating Cone's death sentence due to ineffective assistance of counsel at sentencing. (App. 1). The court of appeals denied Warden Ricky Bell's petition for rehearing on June 1, 2001. (App. 112).

II. Facts Relevant to the Petition

1. The proof at Cone's criminal trial and sentencing is accurately summarized in the Tennessee Supreme Court's decision on direct appeal. *State v. Cone*, 665 S.W.2d at 90-92. (App. 85-90).

The murders of Shipley and Cleopatra Todd were the climax of a series of criminal episodes that began on August 9, 1980, when Cone robbed a jewelry store at gunpoint in Memphis, Tennessee. The jewelry store manager gave a description of the suspect to the police, and an officer in an unmarked police car spotted Cone driving his vehicle a short time after the robbery. Cone apparently became alarmed and accelerated in an attempt to escape. A high-speed chase ensued through mid-town

Memphis and into a residential neighborhood, where Cone abandoned his automobile and proceeded on foot. As he fled from police, Cone shot one of the police officers who attempted to arrest him, shot a citizen who challenged him, pulled a gun on a third person and demanded that the latter give Cone his automobile. When the owner of the automobile fled, Cone snapped his pistol several times, but the ammunition in the weapon had been exhausted.

Cone managed to elude police on August 9th, but appeared at the door of a home in the same neighborhood early the next morning and asked to use the phone. When the elderly resident, Lucille Tuech, refused him admittance, Cone drew his pistol on her. Later that same afternoon, Cone broke into the home of Shipley and Cleopatra Todd, who lived a short distance from Ms. Tuech. Mr. Todd was 93 years of age; his wife was 79. The bodies of both victims were found mutilated and cruelly beaten three days later after authorities were alerted by anxious relatives. Both of the victims had been beaten repeatedly about the head until they died. Cone's fingerprints and hair samples were found in the Todds' home, which had been ransacked, and he was apparently able to steal enough money from their home to fly from Memphis to Florida, where he appeared at the home of an acquaintance on August 12.

Although he admitted killing the Todds and committing the other crimes charged, Cone claimed that he was insane, or lacked the requisite mental capacity to commit the offenses, due to drug abuse and stress arising out of his previous military service in Vietnam. On direct

appeal, the Tennessee Supreme Court found that the evidence was "overwhelmingly sufficient to sustain [Cone's] conviction on all charges." *Cone*, 665 S.W.2d at 91. (App. 88).

2. In his first post-conviction petition, Cone contended that his attorney, John Dice, was ineffective at the penalty phase of trial in failing to introduce mitigating evidence and in failing to make a final argument. The state appellate court rejected both contentions. As to the presentation of mitigating evidence, the court found:

> The appellant [Cone] stated that two medical experts who testified for the defense at the guilt phase of the trial should have been reintroduced to testify at the penalty phase as to the appellant's mental state at the time the crimes were committed. He also contends that his mother should have been reintroduced to testify concerning his early childhood.
>
> The trial court accredited the testimony of the defense attorney during which he explained that this evidence had been presented during the guilt stage of the proceeding. Trial counsel was aware that the trial judge would instruct the jury that it could consider mitigating circumstances proved at the guilt stage of the trial. Defense counsel also testified that the appellant's mother did not make a good witness at the guilt stage of the trial and in his judgment, the best tactic was to not subject her to further cross examination.
>
> The appellant complains because defense counsel did not introduce other relatives and associates to testify concerning his early childhood. Defense counsel testified that these potential

> witnesses were interviewed by him and that he concluded that there was a danger that cross examination would elicit additional criminal activity on the part of the appellant. There is nothing in the record to show that the testimony of these witnesses would have benefited the defense. In the absence of this showing, we will not presume that trial counsel erred in not calling them as witnesses.

Cone v. State, Shelby Criminal, No. 79 (Tenn. Crim. App., November 4, 1987), slip op. at 7-8 (App. 108-09).

Addressing the question concerning waiver of closing argument, the court stated:

> One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastating closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffective assistance. . . .
>
> The question of what witnesses to use and whether to waive final argument are tactical questions upon which competent lawyers might disagree. It cannot be said that incompetent representation had occurred merely because other lawyers, judging from hindsight, might have made a better or different choice of tactics.

Id., slip op. at 9-10 (App. 110).

Assessing counsel's overall performance, the Tennessee appellate court found:

> Trial counsel made a diligent and thorough investigation of the facts and the law. Although the appellant was without funds, trial counsel was able to procure a defense team composed of himself, a research expert, medical experts, and an investigator. No stone was left unturned in the preparation of the appellant's defense. Trial counsel was very conscientious in representing the appellant and placed much thought and effort into the tactical aspects of this case. However, trial counsel's work and diligence could not remove the overwhelming evidence against the appellant, both on the factual issue and insanity issue. In our view, the findings of guilt and the imposition of the death penalty were based upon the facts and the law – not by shortcomings of counsel.

Id., slip op. at 10 (App. 111).

III. The Opinions Below

1. The district court denied Cone's petition for writ of habeas corpus, finding in pertinent part that Cone failed to demonstrate any prejudice from the failure of his trial counsel to introduce mitigating evidence at sentencing. (App. 79). The court further found that Cone failed to meet § 2254(d)(1)'s threshold requirement that a habeas petitioner demonstrate the state court's rejection of his Sixth Amendment claim "involved an unreasonable application of clearly established Federal law." (App. 80).

As to counsel's waiver of closing argument at sentencing, the district court found that Cone failed to offer

any basis to dispute the state court's determination that the decision was a tactical choice to foreclose rebuttal argument by the prosecution and, further, that the state appellate court's decision on the issue was "a reasonable application of Sixth Amendment standards to the facts presented in the state post-conviction proceedings." (App. 80-81).

2. The court of appeals reversed and remanded the case to the district court with instructions to issue a writ of habeas corpus vacating Cone's death sentences due to ineffective assistance of counsel at sentencing. Contrary to the findings of both the Tennessee appellate courts and the district court, the court of appeals concluded that counsel's decision not to present evidence at sentencing and to make no final argument amounted to constitutional ineffectiveness. *Cone v. Bell*, 243 F.3d 961, 979 (6th Cir. 2001) (App. 37). As to the failure to present evidence at the sentencing stage, the court of appeals offered virtually no explanation to support its disregard of the findings of the Tennessee state courts, merely stating, "counsel had plenty of mitigating evidence at his fingertips." *Id.*, 243 F.3d at 978 (App. 35). Further, the court of appeals rejected the Tennessee courts' conclusion that counsel's decision to waive final argument was a legitimate tactical decision, concluding instead that the explanation given by Cone's counsel for waiving closing argument was "totally unreasonable." *Id.*, 243 F.3d at 978 (App. 36). Epitomizing the hindsight judgment condemned by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the court of appeals stated:

We reject out of hand, the argument that a competent attorney would determine that not presenting mitigating evidence of any kind and not making a final argument in a death penalty case is a justifiable "strategy" because doing so might trigger a "devastating" response by the prosecutor – the sole reason assigned by the Tennessee courts for excusing counsel's silence. How much worse off could Cone have been if he were sentenced to death after a "devastating" argument by the prosecutor than if he were sentenced to death after the prosecutor's "mild" request that he be sentenced to death, which was followed by his own attorney's silence? Or, asked differently: How much more devastating for the petitioner could the prosecutor's "devastating" argument have been than the death sentence the petitioner got without such argument?

Cone, 243 F.3d at 978 (App. 35-36).

The court of appeals then determined that Cone need not show actual prejudice under the second prong of *Strickland*, because a presumption of prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), was raised by counsel's behavior. *Cone*, 243 F.3d at 978 (App. 37). The court reasoned that the prosecutor's insistence at the sentencing phase that Cone be put to death had not been subjected to "meaningful adversarial testing" and that counsel had "abandoned" Cone at a critical stage of his trial. *Id.* (App. 37)

In sum, rather than conducting an analysis under *Strickland v. Washington, supra*, the court of appeals simply concluded that the failure to present evidence at a capital sentencing proceeding, combined with counsel's

waiver of closing argument, constitutes a *per se* Sixth Amendment violation under *United States v. Cronic, supra.*

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN *WILLIAMS V. TAYLOR* BY APPLYING A *DE NOVO* STANDARD OF REVIEW TO RESPONDENT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), expressly restricting the power of federal courts to grant writs of habeas corpus to state prisoners. Under pre-AEDPA habeas law, federal courts reviewed "mixed" constitutional questions (*i.e.*, those involving application of constitutional law to facts) *de novo* with a presumption of correctness as to factual findings by the state courts. *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Townsend v. Sain*, 372 U.S. 293 (1963). The AEDPA substantially changed the role of the federal judiciary in reviewing habeas petitions, in particular, limiting the authority to grant the writ even where the federal court concludes in its independent judgment that the decision of the state court was incorrect. As this Court explained in *Williams v. Taylor*, 529 U.S. 362 (2000), under the AEDPA, a federal court's inquiry is limited to the *reasonableness* of the state court's application of clearly established federal law. *Id.*, 529 U.S. at 412.

Here, contrary to this Court's decision in *Williams*, the court of appeals reviewed respondent's ineffective

assistance of counsel claim *de novo*, plainly stating at the outset of its analysis, "A claim of ineffective assistance of counsel presents mixed questions of law and fact which this court reviews *de novo*." *Cone*, 243 F.3d at 975 (App. 30-31). In support of that proposition, the court of appeals relied not on the authority of this Court, but on a Sixth Circuit decision[2] in an appeal from a federal resentencing proceeding.[3] Applying that erroneous standard, the court of appeals wholly disregarded the findings and conclusions of the Tennessee state courts with respect to respondent's ineffective assistance of counsel claim and, essentially, substituted its judgment in the place of the state court in direct contravention of 28 U.S.C. § 2254(d)(1), as interpreted by this Court in *Williams v. Taylor, supra*.

Under the AEDPA, the standard for granting habeas relief with respect to claims that have been previously adjudicated on the merits in state court is a narrow one set forth in 28 U.S.C. § 2254(d), which provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of,

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[2] *United States v. Jackson*, 181 F.3d 740, 744 (6th Cir. 1999).

[3] In fact, the lower court's opinion does not even cite *Williams v. Taylor* – currently this Court's definitive statement on the standard of review under 28 U.S.C. § 2254(d).

> clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In *Williams*, this Court resolved a dispute among the federal appellate courts regarding the proper interpretation of § 2254(d)(1) and articulated the appropriate standard of review as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412.

Williams made clear that the AEDPA removed the authority of the federal judiciary to grant habeas relief based upon its independent judgment that a state court erred on a question of constitutional law or a mixed constitutional question, focusing instead on the reasonableness of the state court's determination in light of Supreme Court authority. Most important, according to *Williams*, and indeed the fundamental difference between § 2254(d) and pre-AEDPA review, is that "an *unreasonable* application of federal law [by a state court] is different

from an *incorrect* application of federal law." *Williams*, 529 U.S. at 512 (emphasis added). The Court further instructed that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States," contained in § 2254(d)(1), refers to holdings, as opposed to *dicta*, of this Court's decisions as of the time of the relevant state court decision. *Williams*, 529 U.S. at 412. The analysis of the court of appeals in this case violated both instructions.

First, after engaging in an independent evaluation of trial counsel's testimony at the state post-conviction hearing, the court of appeals discounted what it described as mere "post hoc justifications" for actions taken at trial, finding that counsel's explanations were "totally unreasonable." *Cone*, 243 F.3d at 978. (App. 34-36). With that assessment, the court concluded that counsel's performance was deficient under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), due to the failure to present mitigation evidence during the sentencing phase of trial and in the decision to waive closing argument at the conclusion of the sentencing phase. The appellate court did so fully realizing that the Tennessee courts had previously reached an opposite conclusion based upon the same testimony. Then, despite the absence of any evidence of prejudice and an express finding to the contrary by the Tennessee state courts, the court of appeals bypassed the second prong of *Strickland* and ruled that under *United States v. Cronic*, 466 U.S. 648 (1984), a presumption of prejudice was raised by counsel's performance. (App. 37).

In contrast, the Tennessee Court of Criminal Appeals previously found that counsel made a series of reasoned

tactical decisions regarding presentation of mitigation proof at the sentencing phase of trial. (App. 108-10). The state court credited counsel's testimony at the post-conviction hearing that he determined not to present additional evidence during sentencing because it had already been presented during the guilt phase and could be considered by the jury for sentencing purposes. (App. 108). In addition, counsel determined that Cone's mother, who testified during the guilt stage, had not been a good witness, and he made a tactical decision not to subject her to further cross-examination. (App. 109). Although Cone complained in state court that defense counsel was ineffective for failing to introduce other relatives and associates to testify about his childhood, the Tennessee court found that he failed to demonstrate how the testimony would have benefited him and correctly refused to presume prejudice absent such proof. (App. 109).

With regard to counsel's decision to waive final argument at sentencing, the state court found:

> One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastating closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffective assistance.

(App. 110).

In sum, the Tennessee Court of Criminal Appeals found that defense counsel made a diligent and thorough investigation of the facts and the law, was conscientious in representing the respondent, and placed much thought into the tactical aspects of this case. The court further found that counsel's diligence "could not remove the overwhelming evidence against the defendant, [and] the findings of guilt and the imposition of the death penalty were based upon the facts and the law – not by shortcomings of counsel." (App. 111). In reaching its decision, the state court identified and applied as controlling legal authority the standard set forth in *Strickland v. Washington, supra.* (App. 107).

Given this Court's decision in *Darden v. Wainwright*, 477 U.S. 168 (1984), the state court's decision could in no way be deemed unreasonable. In *Darden*, this Court deferred to defense counsel's decision not to introduce mitigating evidence at a capital sentencing hearing where defense counsel had engaged in extensive pre-trial preparation, including obtaining a psychiatric report on the defendant with an eye toward mitigation, but for tactical reasons decided not to introduce that evidence at trial. *Id.*, 477 U.S. at 185-87. The Court concluded that the petitioner failed to overcome the strong presumption that the challenged action "might be considered sound trial strategy." *Id.*, 477 U.S. at 186-87. Counsel's performance in Cone's case was far stronger in that mitigating evidence was actually presented during the guilt phase of trial. In *Darden*, the evidence was not presented at all. *Id.*, 477 U.S. at 184-86.

But rather than assessing the reasonableness of the state court's application of *Strickland* to the evidence

before it, as required under *Williams v. Taylor*, the court of appeals reviewed the issue of ineffective assistance of counsel *de novo*, including an apparent re-assessment of the credibility of defense counsel's testimony at the post-conviction hearing, 243 F.3d at 977-78 (App. 34-35), reached an independent determination of the "correct" outcome, and essentially overruled the state court – a result not only contrary to the letter and spirit of the AEDPA, but to the express holding of this Court in *Williams*.

Further, the lower court's reliance on *dicta* in *United States v. Cronic*, 466 U.S. 648 (1984), for the proposition that prejudice must be presumed in this case, directly conflicts with this Court's ruling in *Williams*, is inconsistent with the standard for determining whether a defendant has received constitutionally effective assistance of counsel as set forth in *Strickland v. Washington, supra*, and wholly disregards express findings to the contrary by the Tennessee state courts.

Although the court of appeals paid lip service to the AEDPA by quoting the pertinent statutory provision in the final paragraph of its opinion, it is clear from the opinion below that the court did precisely what it stated in the introduction to the ineffective assistance of counsel claim – it reviewed the mixed constitutional question before it *de novo*.[4] *Cone*, 243 F.3d at 975. (App. 30-31). The

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[4] Indeed, but for the lower appellate court's perfunctory reference to § 2254(d)(1), its mode of analysis of Cone's ineffective assistance claim is indistinguishable from that employed in pre-AEDPA cases.

court of appeals' opinion on this important federal question directly conflicts with the decision of this Court in *Williams v. Taylor, supra*, and certiorari is warranted under Supreme Court Rule 10(c).

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE SPLIT AMONG THE CIRCUITS CONCERNING WHETHER PREJUDICE MAY BE "PRESUMED" UNDER *UNITED STATES V. CRONIC* FROM THE DEFICIENT PERFORMANCE OF COUNSEL WHO ACTIVELY DEFENDED THE ACCUSED AT TRIAL.

The Sixth Amendment to the United States Constitution provides, in relevant part, that, in all criminal prosecutions, the accused shall . . . "have the Assistance of Counsel for his defence." This Court has specified that the right to counsel means the right to "effective assistance of counsel." *See Powell v. Alabama*, 287 U.S. 45 (1932). Until *Strickland v. Washington*, 466 U.S. 668 (1984), the lower courts were in "disarray" concerning how to evaluate claims of ineffective assistance of counsel. *See United States v. DeCoster*, 624 F.2d 196, 204 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 944 (1979). In *Strickland*, this Court established a two-prong test to be applied to claims of ineffective assistance of counsel. First, a defendant must show deficient performance by counsel and, second, that counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Strickland*, 466 U.S. at 687.

On the same day the watershed *Strickland* opinion was issued, this Court also decided another Sixth Amendment case – *United States v. Cronic*, 466 U.S. 648 (1984).

Dicta in *Cronic* suggested that, in rare circumstances, the assistance of counsel might be so lacking that reviewing courts may presume prejudice to the accused, without inquiry into the actual impact of counsel's performance on the outcome of trial. *Cronic*, 466 U.S. at 662. The lower courts are now in "disarray" concerning when the *Cronic dicta* may be applied to dispense with *Strickland's* prejudice prong.

Of course, in *Cronic* itself, this Court refused to apply the presumption of prejudice. Although the circumstances regarding the late appointment of a young, inexperienced attorney outside his area of practice were not ideal, this Court found no basis for presuming prejudice because there was not a complete denial of counsel, or circumstances amounting to a breakdown in the adversarial system. *Cronic*, 466 U.S. at 662. Attempting to illustrate the types of circumstances that might justify applying a presumption of prejudice, this Court referred to situations, in other contexts not involving allegations of ineffective assistance of counsel, that had been adjudged so likely to prejudice the accused that the cost of litigating their effect in a particular case was unjustified. *Cronic*, 466 U.S. at 658 n. 24. For example, this Court has presumed prejudice in cases involving the pervasive influence of the news media, where the proceedings were "entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *Murphy v. Florida*, 421 U.S. 794, 801 (1975); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966). This Court has also presumed prejudice where an involuntary

confession has been introduced into evidence, or where a co-defendant's statement inculpating the defendant has been improperly introduced into evidence. *Payne v. Arkansas*, 356 U.S. 560 (1958); *Jackson v. Denno*, 378 U.S. 368 (1964); *Bruton v. United States*, 391 U.S. 123 (1968).

There are some situations involving the right to counsel that are so clearly analogous to those listed as examples in footnote 24 of *Cronic* that there is no question but that *Cronic's* presumption of prejudice should apply. As this Court pointed out in *Cronic*, the most obvious situation for applying the presumption of prejudice in the Sixth Amendment context is where there has been a complete denial of counsel. *Cronic*, 466 U.S. at 659. But the Court also suggested in *Cronic* that prejudice may be presumed when there has been a "constructive" denial of counsel. The lower courts are now split concerning the types of circumstances that may give rise to a "constructive" denial of the effective assistance of counsel, and this Court's guidance is needed to resolve the issue.

Courts have found constructive denial of counsel in three basic contexts. The clearest cases are those where counsel has been inactive, essentially amounting to providing no defense at all, or where counsel has been absent during critical portions of the trial. For example, in *Martin v. Rose*, 744 F.2d 1245 (6th Cir. 1984), the court found constructive denial where the attorney chose to sit mute throughout his client's trial. After the attorney's motion for continuance was denied, his strategy was to sit quietly throughout the trial and then to rely on his pre-trial objections for appeal after his client was convicted. The court found the petitioner did not need to show prejudice since his attorney's refusal to participate

in the trial resulted in there being no adversarial testing of the prosecution's case whatsoever. *Martin*, 744 F.2d at 1250. Similarly, the court found constructive denial of counsel in *Tippins v. Walker*, 77 F.3d 682 (2nd Cir. 1996), where counsel slept for extended periods throughout the trial. As a final example in this category, in *Green v. Arn*, 809 F.2d 1257 (6th Cir. 1987), *vacated on other grounds*, 484 U.S. 806 (1987), the court found constructive denial of counsel where the defendant's lawyer was absent during the cross-examination of a critical government witness by a co-defendant's attorney. In each of these cases, competent counsel was appointed, but the attorneys either took no steps whatsoever to represent their clients, or failed at critical junctures to serve the interest of their clients.

The second category of constructive denial cases are those in which courts have found structural impediments to the effective assistance of counsel. In *Cronic*, 466 U.S. at 662 n. 32, this Court noted that it had presumed prejudice when counsel labored under an actual conflict of interest. As a similar example of a structural impediment, this Court referred to *Powell v. Alabama*, 287 U.S. 45 (1932), where an out-of-state lawyer was appointed only six days before a complex capital case. In *Powell*, this Court did not examine the actual performance of counsel at trial, but instead concluded that under the circumstances, the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair. *Cronic*, 466 U.S. at 660.

Some lower courts have also created a third category of cases where they have applied the *Cronic* presumption, despite the fact that the accused was represented by a lawyer, and the lawyer actively participated in the case.

Other federal courts, however, have rejected this expansive view of the *Cronic dicta*, holding that prejudice should never be presumed in cases such as this one, where the thrust of the defendant's Sixth Amendment claim focuses on specific deficiencies in defense counsel's actual performance whose effect on the outcome of the trial can be readily ascertained.

For example, in *Scarpa v. Dubois*, 38 F.3d 1 (1st Cir. 1994), *cert. denied*, 513 U.S. 1129 (1995), the First Circuit refused to affirm the district court's expansive application of *Cronic*. In that case, the district court had granted relief because the attorney's trial strategy was based on a misunderstanding of the elements of the crime charged. The circuit court, although acknowledging that the defense had been inadequate, found *Cronic* inapplicable since the attorney was present and participated throughout the trial. The court held that a *Strickland* analysis should be applied in such circumstances.

Similarly, the Fifth Circuit has declined to allow *Cronic* to be "stretched to encompass" the failure of an attorney to conduct an investigation into two of three armed robberies with which his client was charged. *Woodward v. Collins*, 898 F.2d 1027, 1028 (5th Cir. 1990). *See also Toomey v. Bunnell*, 898 F.2d 741, 744 n. 2 (9th Cir. 1990), *cert. denied*, 498 U.S. 960 (1990) (majority declined to apply *Cronic* where attorney "actively participated" at trial, noting that "[w]e have applied the *Cronic* exception very sparingly.").

On the other hand, other circuits have stretched the *Cronic dicta* to apply to such facts. The Ninth Circuit, despite adopting a narrow view in *Toomey, supra*, applied

an expansive interpretation in *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991). There, the attorney failed to call any witnesses and conceded in closing argument that there was no reasonable doubt as to the factual issues presented at trial.[5] In *Osborne v. Shillinger*, 861 F.2d 612 (10th Cir. 1988), the Tenth Circuit applied *Cronic* where the defendant's attorney refused to pursue any non-statutory mitigating circumstances and argued that his client's actions were atrocious.[6]

Clearly, the circuits are in disarray concerning whether a court may apply the *Cronic dicta* to find a "constructive" violation of the Sixth Amendment in cases where counsel has been neither absent nor inactive, but merely inept, and where there was no structural impediment that prevented counsel's effective functioning. Bad lawyering, no matter how bad, does not justify invoking the *per se* presumption of prejudice under *Cronic*. Rather, the *Strickland* analysis is fully competent to vindicate the accused's Sixth Amendment right to counsel in such cases.

Here, Cone's counsel thoroughly investigated the law and facts of his case. As the Tennessee Court of Criminal Appeals observed, "[a]lthough appellant was without funds, trial counsel was able to procure a defense team composed of himself, a research expert, medical experts,

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[5] The Fifth Circuit explicitly disagreed with the Ninth Circuit's application of *Cronic* to the facts presented in *Swanson*. *Childress v. Johnson*, 103 F.3d 1221, 1229 (5th Cir. 1997).

[6] The First Circuit explicitly disagreed with the Tenth Circuit's application of *Cronic* to these facts. *Scarpa v. Dubois, supra*, 38 F.3d at 12.

and an investigator. No stone was left unturned in the preparation of [Cone's] defense." (App. 111). Counsel's opening statement at trial outlined a clear theory of defense, which was reiterated throughout the trial proceedings – that Cone was damaged psychologically and physically (in the form of drug addiction) as a result of service to his country in Vietnam, and that his actions in this case were directly attributable to that damage. He called lay and expert witnesses to support that theory during the guilt phase and actively cross-examined the State's witnesses in both the guilt and sentencing phases of trial. The Tennessee Supreme Court's opinion on direct appeal from Cone's conviction and sentence highlights significant aspects of Cone's proof presented in the guilt phase, including two mental health experts, as well as pertinent information about Cone's background. *State v. Cone*, 665 S.W.2d 87, 91-92 (Tenn. 1984). (App. 89-90). At the beginning of the sentencing phase, defense counsel explained to the jury that the defense would rely in mitigation on proof presented during the guilt phase, as he was entitled to do under Tenn. Code Ann. § 39-2-203(e),[7] argued in support of a number of statutory and non-statutory mitigating circumstances, and asked the jury for mercy on behalf of his client. (App. 114-17).

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[7] Tenn. Code Ann. § 39-2-203(e) (1982) provides in pertinent part: "After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both."

Counsel was neither absent nor inactive, and he was not precluded from rendering effective assistance by any structural impediment – circumstances that might justify application of the *Cronic* presumption because their impact on the outcome of the trial cannot be accurately measured. Rather, the quality and effect of the lawyering afforded Cone is fully capable of assessment under *Strickland*. And both the Tennessee courts and the district court found that Cone received constitutionally effective assistance of counsel under that standard.

The court of appeals failed even to address the prejudice prong under *Strickland*, proceeding directly to a presumption of prejudice under *Cronic*. The court's presumption of prejudice in this case obfuscates the entire rationale of *Cronic* and ignores the clear dictates of *Strickland*. As this Court pointed out in *Cronic*, "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658.

Further, the court of appeals' unnecessarily expansive reading of *Cronic* in this case not only ignores the dictates of *Strickland*, but frustrates the substantial interests of comity, federalism and the finality of judgments. In *Engle v. Isaac*, 456 U.S. 107, 128 (1982), this Court observed that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."

There is a conflict among the circuits concerning the circumstances under which prejudice may be presumed

under *Cronic* to find a Sixth Amendment violation. The lower courts need guidance as to the parameters and proper application of the *Cronic dicta*, and certiorari is warranted under Supreme Court Rule 10(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL E. MOORE
Solicitor General

AMY L. TARKINGTON
Deputy Attorney General

JENNIFER L. SMITH
Assistant Attorney General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 20207
Nashville, Tennessee 37202
(615) 532-7911

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY BRADFORD CONE, *Petitioner-Appellant,* *v.* RICKY BELL, Warden, Riverbend Maximum Security Institution, *Respondent-Appellee.*	))))))))	No. 99-5279

Appeal from the United States District Court
for the Western District of Tennessee at Memphis
No. 97-02312 – Jon Phipps McCalla, District Judge.

Argued: September 12, 2000

Decided and Filed: March 22, 2001

Before: MERRITT, RYAN, and NORRIS, Circuit Judges.

COUNSEL

ARGUED: Paul R. Bottei, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee. **ON BRIEF:** Robert L. Hutton,

GLANKLER & BROWN, Memphis, Tennessee, for Appellant. Tonya G. Miner, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee.

OPINION

RYAN, Circuit Judge. Gary Bradford Cone was convicted in a Tennessee state court on two counts of first degree murder, two counts of murder in the perpetration of a burglary, three counts of assault with intent to commit murder, and one count of robbery by use of deadly force. He was sentenced to death. His appeal to the Tennessee Supreme Court and two post-conviction petitions for relief were unsuccessful. He then filed a petition for a writ of *habeas corpus* in the federal district court, and it was denied. This court issued a certificate of appealability.

We now affirm the denial of Cone's petition with regard to the offenses of conviction but grant his petition with respect to the death sentence because, in the sentencing phase of his trial, Cone was denied the effective assistance of counsel guaranteed him by the Sixth Amendment to the United States Constitution.

I.

Facts

The crime spree that culminated in Cone's conviction and sentence to death began on August 9, 1980, when he

robbed a jewelry store in Memphis, Tennessee, of approximately $112,000 worth of goods. The police were alerted and they promptly spotted Cone driving a car. A high speed chase ensued, following which Cone abandoned the car in a residential neighborhood, shot pursuing police officer B.C. Allen and citizen John Douglas Clark, and unsuccessfully tried to shoot a third citizen, Herschel Dalton when Dalton refused to surrender his car to Cone. Cone temporarily eluded the police, but they seized his car and in it found a large amount of cash, drugs, and the stolen jewelry.

The next day, Cone appeared in the same residential neighborhood at the home of Lucille Tuech. He drew a gun on Tuech when she refused to let him in to make a phone call. Later the same day, Cone broke into the home of an elderly couple, Shipley and Cleopatra Todd, who were 93 and 79 years old, respectively. Cone tried to convince the couple to help him, but when they refused to cooperate, he brutally killed them. Three days later, the Todds' severely beaten and mutilated bodies were found in their home. Cone's fingerprints and hair samples were also found in the home. In due course, Cone was arrested in Florida and returned to Tennessee.

II.

State Court Trial Proceedings

Cone's jury trial was held in Shelby County Criminal Court beginning on April 14, 1982. It concluded with a jury verdict that found him guilty of: (1) two counts each of first degree murder and murder in the perpetration of a burglary involving the Todds; (2) assault with intent to

commit murder in the first degree against Officer Allen, Clark, and Dalton; and (3) robbery with a deadly weapon, of the jewelry store clerk. Cone was sentenced to 10 to 25 years in prison on the assaults, life imprisonment on the robbery, and death on the two murder charges. He appealed as of right to the Tennessee Supreme Court, which affirmed the conviction and sentence.

A.

State Court Collateral Proceedings – First Petition

On June 22, 1984, Cone filed his first state post-conviction petition, attacking his conviction and death sentence. He alleged that his rights had been violated under the First, Fourth, Fifth, Sixth, Eight [sic], Ninth, and Fourteenth Amendments to the United States Constitution, and particularly, that he had been denied the effective assistance of counsel at trial. On November 21, 1984, Cone filed an amended post-conviction petition, claiming that his prosecutors had engaged in misconduct and alleging additional instances of ineffective assistance of counsel. The state trial court held a hearing and denied Cone's petition.

Cone appealed that denial to the Tennessee Court of Criminal Appeals, and on November 4, 1987, that court affirmed.

On December 21, 1987, Cone sought permission to appeal to the Tennessee Supreme Court, raising only claims of prosecutorial misconduct and ineffective assistance of counsel, but his petition was denied.

B.

State Court Collateral Proceedings – Second Petition

On June 15, 1989, Cone, acting *pro se*, filed a second state post-conviction petition, and on June 22, 1989, an amended petition. The trial court dismissed the amended petition as barred by the successive petition restrictions of Tennessee's post-conviction statute. Tenn. Code Ann. § 40-30-112 (1990) (since repealed). Cone appealed, and on May 15, 1991, the Court of Criminal Appeals reversed and remanded the amended petition to the trial court to allow Cone to "rebut the presumption of waiver." A presumption of waiver arises under Tennessee law if a claim for relief is not asserted before a court of competent jurisdiction in which the claim could have been presented. Tenn. Code Ann. § 40-30-112 (1990) (since repealed). On August 13, 1993 and October 5, 1993, Cone's post-conviction counsel filed second and third amended petitions, alleging more ineffective assistance of counsel claims. Finally, on November 12, 1993, counsel filed a fourth amended petition.

The trial court, on remand, dismissed the amended petitions under Tenn. Code Ann. § 40-30-112(b), holding that all the grounds raised were barred because they had previously been determined or were waived. This judgment was affirmed by the Tennessee Court of Criminal Appeals, and the Tennessee Supreme Court denied an application for permission to appeal.

Cone filed a motion for a rehearing, but it too was denied by the Tennessee Supreme Court. The United States Supreme Court denied Cone's petition for a writ of *certiorari*.

III.

Federal Court *Habeas* Petition

Cone then filed a motion in federal district court to stay his execution; the court granted the stay and permitted the filing of a *habeas* petition under 28 U.S.C. § 2254. On July 1, 1997, Cone filed a petition for a writ of *habeas corpus* in federal district court. On October 14, 1997, Cone filed motions for an evidentiary hearing and for discovery, but they were denied. The district court also denied the section 2254 petition, and further, denied a certificate of appealability, finding that an appeal would not be taken in good faith. The court also lifted the stay of execution, however, a new execution date was not set. This court then granted Cone's motion for a certificate of appealability.

We review *de novo* the district court's disposition of a petition for *habeas corpus*, but we review the district court's factual findings for clear error. *Carter v. Bell*, 218 F.3d 581, 590 (6th Cir. 2000).

IV.

Federal *Habeas* and Tennessee Waiver

Before addressing the substance of Cone's several constitutional claims, it might be useful to review the basis for this federal court's authority to examine the validity of a state court conviction.

A federal court may grant relief on a petition for a writ of *habeas corpus* only if the applicant has exhausted the remedies available in the state court. 28 U.S.C.

§ 2254(b)(1)(A) (West Supp. 2000). If the state court adjudicates and rejects a claim on adequate and independent state grounds, such as a state procedural rule that precludes adjudicating the claim on the merits, the petitioner is barred by this procedural default from seeking federal *habeas* review of such claim, unless the petitioner can show "cause and prejudice" for the default. *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

However, there are several prerequisites before the cause and prejudice test is applied in a federal court to any kind of state procedural default. "First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). "Second, the court must decide whether the state courts actually enforced the state procedural sanction." *Id.* Third, the procedural default must be an "independent and adequate" state ground on which the state can rely to foreclose review of a federal constitutional claim. *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 148 (1979). If these three prerequisites are met, a federal court must determine whether the petitioner is able to meet the cause and prejudice test to excuse the state procedural default.

The cause and prejudice standard is a two-part test in which the petitioner must: (1) present a substantial reason to excuse the default, *Coleman*, 501 U.S. at 754; and (2) show that he was actually prejudiced as a result of the claimed constitutional error, *United States v. Frady*, 456 U.S. 152, 167-69 (1982).

If the claims presented in the federal court were never actually presented in the state courts, but a state procedural rule now prohibits the state court from considering them, the claims are considered exhausted, but are procedurally barred. *Coleman*, 501 U.S. at 752-53.

Under Tennessee law at the time of Cone's conviction, grounds for relief that had been previously determined or waived were not cognizable in a state post-conviction action. Tenn. Code Ann. § 40-30-111 (1990) (since repealed). Moreover:

> (a) A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.
>
> (b)(1) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.
>
> (2) There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

Tenn. Code Ann. § 40-30-112 (1990) (since repealed).

A federal court will not grant *habeas corpus* relief unless the state adjudication of the federal claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (West Supp. 2000).

V.

The *Brady* Claim

The first of Cone's claims before us is his assertion that the state prosecutors withheld exculpatory documentary evidence from him in violation of the rule announced in *Brady v. Maryland*, 373 U.S. 83 (1963). The *Brady* rule requires the government "to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). A *Brady* violation is grounds for setting aside a conviction or sentence only if the failure to declare the relevant material "undermines confidence in the verdict, because there is a reasonable probability that there would have been a different result had the evidence been disclosed." *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999).

The respondent argues that this claim has been procedurally defaulted under Tennessee law and therefore may not be entertained here. Cone argues that he has not procedurally defaulted his *Brady* claims because he was unable to raise the claims in his first and second petitions for post-conviction relief because he did not then know the alleged *Brady* material existed. He also argues he has "cause" for any procedural default because some of the allegedly withheld documents were only recently available to him through discovery in 1997. He then proceeds to argue the merits of his *Brady* claim. Although it is a difficult question, we believe that Cone's claims are procedurally defaulted and that he cannot show cause and prejudice to overcome the default. And even if that were

not so, we are satisfied that the documents Cone complains were withheld are not *Brady* material.

A.

Cone claims the documents that were withheld by the state prosecutors fall into four groups: (1) evidence regarding his drug use; (2) evidence that might have been useful to impeach the testimony and credibility of Officer Ralph Roby; (3) FBI reports; and (4) evidence showing that the prosecution's witness, Ilene Blankman, was untruthful and biased. We will take up each category of documents separately and then discuss whether they are *Brady* material at all.

1.

First, Cone claims that the prosecution withheld several witnesses' statements which indicate that the prosecution knew about Cone's drug use. These include: a statement by Robert McKinney, who stated he was present at the time of the robbery, and that Cone "acted real weird" and appeared to be on drugs; statements from Charles and Debbie Slaughter that Cone "looked wild eyed" the day before the killings; a statement by Sergeant Grieco of the Pompano Beach, Florida, Police Department who described Cone as looking "frenzied" and "agitated" a few days after the killings; and a statement from Chief Daniels of the Lake Village, Arkansas, Police Department who informed authorities that Cone "was a heavy drug user."

Cone claims that his "amphetamine psychosis" defense – essentially an insanity defense – was undercut because the prosecution withheld these documents from his examination. Each of the statements was part of the state District Attorney's files, except for Chief Daniels's statement. It is difficult to discern from the record whether Chief Daniels's statement was for certain in the DA's files, nevertheless, it appears to be part of it. However, in his petition for a writ of *habeas corpus*, Cone admits Chief Daniels's statement was indeed part of the DA's files and that he had access to the files in 1992. Cone claims to have been unaware of their existence until 1992. Whatever the date of his discovery of the existence of these documents, it is clear that Cone learned of these materials well before his second and third amended petitions were filed on August 13 and October 5, 1993, respectively.

A careful examination of the state court proceedings reveals that before filing his petition for a writ of *habeas corpus* in the federal court on July 1, 1997, Cone three times raised a generalized claim in the state courts that the prosecution had withheld evidence. He raised the issue for the first time in his *pro se* amended petition for post-conviction review, dated June 1989, wherein he claimed that the prosecution had been withholding evidence. The Tennessee criminal court determined that the claim had been waived by failing to raise it in his direct appeal. This determination was affirmed on appeal. Cone raised the issue again in his second amended petition for post-conviction relief in August 1993, and this time claimed somewhat more specifically, that the prosecution had withheld evidence regarding Ilene Blankman. Finally,

Cone raised the issue in his third amended petition for post-conviction relief in October 1993; this time his claim was that the state withheld exculpatory evidence that it knew of Cone's drug problem. This evidence, he claimed, included the statements by Charles and Debbie Slaughter, among others. The August 13, 1993 and October 5, 1993, amended petitions were dismissed by the trial court, which found that the claims had been previously determined or waived. This was affirmed on appeal. *Cone v. State*, 927 S.W.2d 579 (Tenn. Crim. App. 1995).

Although Cone is correct in his argument that he in fact raised in the state court this first of his four *Brady* claims – that the prosecution withheld evidence that the state knew of his drug use – and therefore, that this claim was exhausted, we may not review a claim that has been decided in the state court on an "independent and adequate" state ground, as was the case here. The independent and adequate state ground in this instance is the state court's finding that Cone's claims were previously determined or waived under Tenn. Code Ann. § 40-30-112 (1990) (since repealed). Thus, this first of Cone's four-part *Brady* claim is procedurally defaulted.

In addition, even if Chief Daniels's statement were not part of the DA's files, and Cone did not have access to it, it is not *Brady* material. The statement that Cone "was a heavy drug user" does not undermine our confidence in the verdict such that a reasonable probability exists that the verdict would have been different, because of the overwhelming evidence of Cone's guilt.

2.

The second of Cone's *Brady* claims is that the prosecution withheld evidence that Cone might have used to impeach the credibility of Officer Roby. According to Cone's interpretation of Officer Roby's testimony, the officer testified that there was no evidence that Cone had used drugs. According to Cone, the documents withheld from him included an All Points Bulletin sent out by Officer Roby, in which Roby warns the nation that Cone is not only a "drug user," but a "heavy drug user," and evidence that Cone's sister told Officer Roby that Cone had a "severe psychological problem" and "needed to work on his drug problem." Cone claims these two pieces of evidence show the falsity of Officer Roby's testimony that Cone was not a drug user. These two items of evidence were indeed part of the state DA's files and arguably fall within Cone's claim that the state withheld exculpatory evidence regarding his drug use, a claim he raised in his third amended petition for post-conviction relief.

The state court ruled that the claim had been previously determined or waived by Cone's failure to raise it earlier. This determination was affirmed on appeal. *Cone*, 927 S.W.2d 579. Again, we will not review a claim that has been determined under an independent and adequate state ground, and therefore this claim, likewise, is procedurally defaulted.

3.

Cone's third *Brady* claim is that certain FBI reports were withheld from him. He argues that several documents demonstrate that the FBI knew he had a severe drug problem, and that had Cone known of these documents at trial, he might have used them to impeach FBI Agent Eugene Flynn's testimony that Cone was not insane. The evidence included a nationwide FBI alert indicating Cone was a heavy drug user and an FBI document showing Cone was in possession of amphetamines in the late 1970s. In addition, Cone complains that Agent Flynn had access to a report prepared by a witness, Dr. Jonathan Lipman, who testified against Cone. Cone claims that the presence of Dr. Lipman's report in the FBI files demonstrates that Dr. Lipman was not a disinterested witness.

It appears that Cone did not make a request for the FBI documents until after he filed his second petition for post-conviction review and then he requested only FBI reports regarding himself and Ilene Blankman. His request did not refer to Dr. Lipman's report. It further appears that all of this evidence was in the DA's files and could have been discovered by Cone in 1992. He could have raised this claim in the state court in 1993, however, he did not do so. Because this claim regarding the FBI materials and Dr. Lipman's report was not raised in the state court when Cone had the opportunity to do so, it is procedurally defaulted.

4.

Cone's fourth *Brady* claim is that the prosecutors withheld evidence that Cone might have used to impeach the testimony of prosecution witness Ilene Blankman. This witness testified at trial that Cone had never used drugs in her presence. The withheld evidence, according to Cone, is that the prosecution's file showed that the prosecutors had ongoing contact with Blankman, took her to dinner, and sent her a thank you letter after the trial was concluded and Cone was sentenced. This "withheld" evidence, Cone argues, might have been useful to impeach Blankman's credibility by showing her bias. As to whether Cone has exhausted this claim, it is true that he alleged in his second amended petition that the prosecution had withheld exculpatory evidence regarding Ilene Blankman. But the state court found that claim waived for not being raised earlier. Again, we do not review a claim that has been determined under an "independent and adequate" state ground, and thus it is procedurally defaulted. We conclude that Cone has procedurally defaulted all four of his *Brady* claims.

B.

We must now inquire whether Cone has made a sufficient showing under the familiar "cause and prejudice" standard to excuse his procedural default. We first determine whether the three prerequisites to application of the cause and prejudice test have been established. We think they have. To repeat, they are: (1) that there is a state procedural rule applicable to Cone's claim and that he failed to comply with it; (2) that the state actually

enforced the state rule; and (3) that Cone's noncompliance with the rule is an independent and adequate state ground for denying state review of a constitutional claim. *Maupin*, 785 F.2d at 138. As to the first requirement, the Tennessee waiver rule is plainly applicable to Cone's *Brady* claims; second, the Tennessee courts explicitly relied upon the waiver rule when deciding whether to consider Cone's post-conviction *Brady* claims; and third, the state's legitimate interest in requiring a defendant to raise all the claims he has at one time, thus avoiding multiple bites at the apple, is an independent and adequate state ground.

We are satisfied that Cone's *Brady* claims have been procedurally defaulted in the Tennessee courts, and so the next question is whether Cone has established cause and prejudice sufficient to excuse his procedural default. Cone must show that there is a reasonable cause for his failing to raise these claims timely, and if he makes that showing, that withholding the documents unfairly prejudiced him.

It is remarkable and significant that Cone does not argue in his brief before this court that there is a justifiable *cause* for his failure to raise his first, second, and fourth *Brady* claims in a timely manner in the state courts. Instead, he argues the merits of the claims. Cone's only mention in this court of his procedural default with respect to these three *Brady* claims appears in his reply brief, wherein he simply asserts that he raised the claims in state court and thus they are *not* procedurally defaulted, a position contradicted by the findings of the Tennessee courts and by the record.

Moreover, but not surprisingly, Cone does not argue the prejudice prong of the cause and prejudice test. According to *Frady*, 456 U.S. 152, "a convicted defendant must show *both* (1) 'cause' excusing his . . . procedural default, *and* (2) 'actual prejudice' resulting from the errors of which he complains." *Id.* at 168 (emphasis added). Therefore, we have no occasion to consider whether Cone's procedural default with respect to the first, second, and fourth of his *Brady* claims is excused under the cause and prejudice standard and thus no authority to consider the claims on the merits.

Cone's third *Brady* claim, that FBI documents were allegedly withheld, was indeed raised, but only in Cone's petition for a writ of *habeas corpus* in the federal court; it was never raised in the state court. Cone argues that there is no state court procedural default with respect to this claim because the FBI records are privileged and were made available to him only through discovery granted by the federal district court in 1997, and thus he could not have successfully requested them in a timely fashion. Assuming without deciding that Cone has reasonable cause for not raising this issue timely in his state post-conviction proceedings (because he did not learn of the FBI records until 1997), the fact remains that he makes no argument that he was *prejudiced* as a result of the government's failure to disclose to him the existence of the FBI documents, and thus he completely ignores the prejudice prong of the cause and prejudice standard. We are satisfied that because he did not raise this claim in the state court and has not made a showing under the prejudice prong of the cause and prejudice standard that

would excuse his default, we may not now review this claim.

In conclusion, Cone's default in failing to raise these claims in the state court and further default in failing in the federal court to justify that failure forecloses us from reaching the merits of those claims.

VI.

Jury Instructions

Cone claims he was denied a fair trial because the trial court's jury instructions unconstitutionally equated "reasonable doubt" with "moral certainty." The challenged instruction was as follows:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible, or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense.

Although Cone admits that the reasonable doubt instruction in his case was "similar" to the instruction given and approved in *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997), he alleges that he received an additional instruction that made the instructions, when taken as a whole, unconstitutional. The additional instruction stated:

> It is not necessary that each particular fact should be proved beyond a reasonable doubt if enough facts are proved to satisfy the jury beyond a reasonable doubt of all the facts necessary to constitute the crime charged. Before a verdict of guilty is justified, the circumstances, taken together, must be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion and producing in effect a moral certainty that the defendant, and no one else, committed the offense.

The Tennessee Court of Criminal Appeals determined that since Cone did not raise the reasonable doubt argument until his second post-conviction petition, he had defaulted this claim. The court determined that Cone should not be able to "delay the administration of justice *ad infinitum* by filing subsequent petitions which disingenuously claim that the grounds asserted were unknown to the appellant when his previous petition was filed." *Cone*, 927 S.W.2d at 582. This is an independent and adequate ground that bars the consideration of these claims in this court. *Wainwright*, 433 U.S. at 87-88.

Cone argues that his jury instruction claim is not procedurally defaulted for three reasons. First, he violated no "clearly established" rule when he presented his claim in his second post-conviction petition, where he did not "knowingly and understandingly" fail to present the claim earlier, as required by Tenn. Code Ann. § 40-30-112(b). Second, he could not have defaulted his claim because there is no valid procedural default unless all similarly situated petitioners have been found defaulted by the state courts. Third, he has "cause" for

failing to raise the claim earlier because he did not have effective trial or appellate counsel.

Assuming without deciding that Cone has not procedurally defaulted his claim, or, if he has, he can show cause and prejudice, his claim is meritless. A nearly identical instruction has been approved by this court in *Austin*, 126 F.3d at 846. The instructions, taken together and in the context in which they were given, did not allow the jury to convict in order to reach a mere "satisfactory conclusion," as Cone suggests. *See Victor v. Nebraska*, 511 U.S. 1, 16 (1994).

VII.

Other Claims

We find no fault with the district court's dismissal of the claim of prosecutorial misconduct. Cone claims that the prosecution's closing argument in the guilt phase of the trial was improper and that it undercut Cone's amphetamine psychosis defense. The prosecution's argument was that the money found in Cone's car suggested that Cone was a drug seller, not a drug user. This, despite the fact that the prosecution knew that most of the money was stolen from a supermarket during Cone's crime spree.

Cone first raised this prosecutorial claim in the context of an ineffective assistance of counsel claim. The Tennessee Court of Criminal Appeals rejected the claim that the prosecution's argument affected the outcome of

the trial when it rejected his first petition for post-conviction relief. *Cone v. State*, 747 S.W.2d 353, 355 (Tenn. Crim. App. 1987).

Cone next raised the claim in his second petition for post-conviction relief. The Tennessee Court of Criminal Appeals determined that Cone's claims had been either previously determined or waived. *Cone*, 927 S.W.2d 579.

In Cone's *habeas* petition, the federal district court determined that this claim was without merit. The court found that this argument exaggerated the importance of the prosecutor's statement and ignored the fact that there was other evidence that Cone was indeed using drugs. Cone did not convince the district court that the state court's rejection of this claim "involved an unreasonable application of[ ] clearly established Federal law, as determined by the Supreme Court of the United States" under section 2254(d)(1). Rather, the district court determined that Cone's "out-of-his-mind-on-amphetamines" defense was not rejected by the jury because the prosecutor accused him of being a drug seller, but because Cone failed to present credible evidence that he had actually abused amphetamines at any time close to the murders.

In order to make a claim for prosecutorial misconduct, a defendant must demonstrate that: "(1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." *Coe*, 161 F.3d at 343.

We find that the statements made by the prosecutor referring to Cone as a drug seller are not material, and we agree with the district court that the statement was too remote from the real issues in this case to have affected

the jury's deliberations. Cone's drug psychosis defense was not substantially undercut by the prosecutor's remarks; rather, Cone simply did not present credible evidence that he was using drugs at the time he committed the murders. Under 28 U.S.C. § 2254(d), this decision does not appear to be contrary to, or involve an unreasonable application of, clearly established Federal law as determined by the Supreme Court.

VIII.

Malice Instruction

Cone also claims that he was denied due process in that the state trial judge's instruction on malice was erroneous and unconstitutionally shifted the burden of proving this element to Cone.

Cone first raised a challenge to these instructions in his second petition for post-conviction relief. The Tennessee Court of Criminal Appeals determined that the claim had been previously determined or waived by failure to raise it earlier.

In Cone's petition for a writ of *habeas corpus*, Cone raised this issue again. However, the district court determined that this claim was procedurally defaulted. It based its decision on a procedurally similar case, *Coe*, 161 F.3d 320. In that case, the Sixth Circuit determined that the state rule was an independent and adequate ground that barred relief in this court, where the petitioner raised his claim in his second petition for post-conviction relief only, and the state court determined that his claim was previously determined or waived. In this case, the district

court relied on the finding of the Tennessee Court of Criminal Appeals that Cone raised this claim in his second petition for post-conviction relief only and thus his claim was previously determined or waived. According to *Coe*, the Court of Criminal Appeals' decision constitutes an independent and adequate ground that bars the consideration of these claims in the district court.

We agree with the district court and find that this claim is procedurally defaulted on an independent and adequate state ground. However, if Cone is able to demonstrate cause and prejudice, his default would be excused.

Cone argues that even if he did fail to raise timely his claim of an erroneous jury instruction on malice, he has not defaulted the claim for several reasons. First, he did not give a personal "knowing[ ] and understanding[ ]" waiver, as required by the Tennessee statute, since he is not chargeable for any waiver made by his attorney. Tenn. Code Ann. § 40-30-112 (1990) (since repealed). Second, he argues that his claim cannot be defaulted because there can be no procedural default unless all similarly situated petitioners have been found defaulted by the state courts. Third, Cone claims that during the time of his state petitions for post-conviction relief, Tennessee law was in a state of confusion as to whether an "objective" or "subjective" standard was to be used in determining whether a claim was waived. Cone does not clearly explain his understanding of the difference between the "objective" and "subjective" standards to which he refers, and we do not find these terms helpful.

First, we are aware of two cases in which courts have considered whether a petitioner is bound by his attorney's waiver of a constitutional claim, *Coe*, 161 F.3d 320, and *House v. State*, 911 S.W.2d 705 (Tenn. 1995). The *House* court stated that "[w]aiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney." *House*, 911 S.W.2d at 714. *House* does not appear to announce a new standard, as Cone suggests. Rather, it seems merely to affirm Tennessee's standard of waiver.

In *Coe*, as we explained earlier, this court held that the petitioner had procedurally defaulted his state claim that the trial court failed to give a correct malice instruction. He presented the claim for the first time in his second petition for post-conviction relief rather than his first petition, as a consequence of which the Tennessee Court of Criminal Appeals found it had been procedurally waived. *Coe*, 161 F.3d at 329-31. This court cited *House* when determining that Coe had defaulted his claim under an "objective" standard of waiver. However, the petition upon which the court relied in finding the default was filed before *House* was decided. Thus, concerning defaults that occurred before *House* was decided, the Tennessee courts have strictly and regularly applied the traditional standard of waiver, whether the waiver is made by counsel or the petitioner personally.

The cases that Cone cites to support his position that a petitioner must "knowingly and understandingly" waive a constitutional right are not helpful because they are distinguishable from his case. Those cases are either: (1) unpublished (*Richardson v. Dutton*, No. 86-5437, 1987

WL 38229 (6th Cir. Nov. 18, 1987)); (2) determined after Cone filed his petition and thus he could not have relied on them (*Wooden v. State*, 898 S.W.2d 752 (Tenn. Crim. App. 1994), *Johnson v. State*, No. 02C01-9111-CR-00237, 1994 WL 90483 (Tenn. Crim. App. Mar. 23, 1994)); or (3) hold that a petitioner did not personally waive claims by not raising them earlier on the ground that the petitioner did not have counsel at the time (*Swanson v. State*, 749 S.W.2d 731 (Tenn. 1988), *Freeman v. State*, No. 70, 1988 WL 94769 (Tenn. Crim. App. Sept. 14, 1988)).

Cone's second reason why his claim cannot be defaulted also fails. He claims that there can be no valid procedural default unless all similarly situated petitioners have been found defaulted by the state courts. *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982). This is, essentially, an argument that the state ground is not considered adequate unless the procedural rule is strictly and regularly followed. *Id.* However, as explained in *Coe*, the Tennessee courts have strictly, regularly, and consistently followed the waiver rule in similar cases. *Coe*, 161 F.3d at 331.

Last, we are not persuaded that Cone is correct in his claim that Tennessee law was in a state of confusion on whether an "objective" or "subjective" standard of waiver is appropriate. It is not clear from the Tennessee cases that procedural default may not be charged to a petitioner who has not himself "knowingly and understandingly" waived timely assertion of a federal constitutional claim when his attorney has done so. We are satisfied that Tennessee follows the traditional rule that a petitioner is chargeable with his attorney's failure to

timely assert a claim and with the consequences of failing to do so.

In one sentence, Cone claims that an additional cause for his failure to raise the malice instruction issue in the state court is the ineffectiveness of his state counsel. Cone makes no argument, factual or legal, in support of his assertion, but newly instructs the reader to "*See* pp. 56-58, supra." Reference to those pages indicates that Cone appears to be incorporating by reference his earlier argument with respect to the defaulted reasonable doubt/moral certainty instructional issue, that "trial and appellate counsel . . . may have been ineffective" because in the state court appeal, weaker legal issues were raised and "this was counsel[']s first capital trial and appeal."

Although it is well settled that the ineffective assistance of trial or appellate counsel may be cause sufficient to excuse a procedural default in raising a federal constitutional issue in state court, it is also settled that the petitioner must show both cause and prejudice to excuse the default. *See Coleman*, 501 U.S. at 750-51; *Frady*, 456 U.S. at 168-69. In this instance, while Cone claims ineffectiveness of counsel as the cause for his default, he does not claim any prejudice; he makes no mention of the prejudice prong of the cause and prejudice test at all.

For that reason alone, we would be justified in rejecting his ineffectiveness-of-counsel-as-cause argument. *See Frady*, 456 U.S. at 170. But Cone's argument fails for the more fundamental reason that he has not shown that his state counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, Cone must show that in failing to raise the malice instruction issue in

the state court, his "counsel's performance was deficient," which requires a "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

Cone has utterly failed to meet the requirements of *Strickland* with respect to this issue. In the first place, he makes no independent argument, factual or legal, relating to his failure to raise the malice instruction issue in the state court of his attorney's performance. He merely invites us to "see" his argument that his counsel was constitutionally ineffective for failing to raise an altogether different instructional issue because "weaker" issues were raised and it was counsel's first capital case. Succinctly put, this sort of parenthetical instruction to this court to piece together a constitutional claim of ineffectiveness of counsel from the language Cone used in presenting the claim with a different instructional issue early in his brief does not meet his obligation under *Strickland*. Even if we were to heed Cone's instruction to us to assemble his ineffective assistance of counsel argument for him, the argument would fail because (1) counsel's failure to raise every conceivable issue on appeal that might have been raised, even issues arguably stronger than those that were raised, and (2) handling one's first capital case, are not, *per se*, "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*

In addition, as we have said, Cone makes no claim whatever that he was prejudiced as a result of the trial court's malice instruction.

For these reasons, Cone has not satisfied his burden under the cause and prejudice test, and we may not therefore reach the procedurally defaulted malice instruction issue.

IX.

Cruel and Unusual Punishment

We decline to address Cone's Eighth Amendment cruel and unusual punishment argume... and his argument concerning the application of aggravating circumstances because we have vacated the death sentence for the reasons set forth below.

X.

The Death Sentence

Cone argues that his death sentence must be vacated because he was denied the effective assistance of counsel at his sentencing as guaranteed by the Sixth Amendment. He claims that at sentencing his counsel offered no evidence whatever in mitigation and made no argument of any sort prior to sentencing. We agree that Cone was denied the effective assistance of counsel, and accordingly, we must vacate his death sentence.

Before going to the merits of this issue, it is appropriate to describe its procedural route to this court. Cone raised the issue of the ineffectiveness of his counsel at sentencing in his first petition for post-conviction relief, arguing that his trial counsel was ineffective for failing to present mitigating evidence at the sentencing phase of the trial and for waiving final argument. The Tennessee

court determined that the attorney's silence at Cone's sentencing was not ineffective assistance because it was part of the attorney's "strategy" to prevent the prosecutor from making a "devastating" closing argument, for which he was apparently well-known. The trial court stated, in its September 19, 1986, opinion on Cone's first petition for post-conviction relief:

> This Court finds from the facts and circumstances that [defense counsel] put a great deal of thought and preparation in this case; further, he pointed out he interviewed numerous family members and relatives whose testimony was contradictory and generally not helpful. He said his strategy was to get as much mitigation in during the guilt/innocence phase as he could. It is the opinion of this Court that the defense attorney's performance, including his decision not to introduce any evidence in mitigation, did not fall below the objective standard of reasonableness set by the Sixth Amendment's guarantee of the effective assistance of counsel. . . .
>
> In reference to the waiver of final argument in the penalty phase it was clear [from] testimony from the record that this was strategy on the part of defense counsel, in view of the prosecutor's . . . reputation for devastating closing arguments.

This decision was affirmed on appeal to the Tennessee Court of Criminal Appeals, which stated in part:

> One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other

> prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastating closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffective assistance.

Cone, 747 S.W.2d at 357.

Cone raised this issue again in his second petition for post-conviction relief. At that time, the Tennessee court determined that the claim was either previously determined or waived and the court dismissed it. On appeal, the Tennessee Court of Criminal Appeals reversed. The court cited *Swanson*, 749 S.W.2d 731, for the proposition that a petition for post-conviction relief, which stated a colorable claim for relief, should not be dismissed as having been waived without an opportunity to show the lack of waiver, unless waiver is clear. The court remanded the case to allow Cone to "rebut the presumption of waiver." However, on remand, the trial court determined that all of Cone's ineffective assistance of counsel claims – those relating to the guilt phase and those relating to the sentencing phase – should be considered as one claim.

Cone raised the issue for the third time in his petition for a writ of *habeas corpus* in the federal district court. The respondent does not argue that Cone's ineffective assistance of counsel claim based on the lack of mitigating evidence at sentencing and the failure to make a final argument is procedurally defaulted. Therefore, the claim is properly before us.

A claim of ineffective assistance of counsel presents mixed questions of law and fact which this court reviews

de novo. *United States v. Jackson*, 181 F.3d 740, 744 (6th Cir. 1999). To repeat, in order to succeed on an ineffective assistance of counsel claim, a petitioner must show:

> First, . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

Under the first prong of *Strickland*, we must determine whether Cone's counsel, in remaining completely silent during the sentencing phase of the trial, except to declare that he "rested" – offering no evidence in mitigation and declining to address the court and jury – acted within an objective standard of reasonableness. *Olden v. United States*, 224 F.3d 561, 565 (6th Cir. 2000). If he did not, we must then turn to the second prong of *Strickland* and determine whether the petitioner has demonstrated a reasonable probability that he would not have been sentenced to death but for his counsel's failure. *Strickland*, 466 U.S. at 693-94.

In an appropriate case, *Strickland*'s prejudice prong may be presumed. *United States v. Cronic*, 466 U.S. 648 (1984).

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. . . . But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Id. at 656-57.

For example: "[I]f the accused is denied counsel at a critical stage of his trial [or] . . . if counsel *entirely fails* to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659 (emphasis added) (footnote omitted). In such a case, it is not necessary to demonstrate actual prejudice. *Rickman v. Bell*, 131 F.3d 1150, 1155 (6th Cir. 1997). Moreover, a defendant may demonstrate the "constructive" denial of counsel when, although counsel is present, " 'the performance of counsel [is] so inadequate that, in effect, no assistance of counsel is provided.' " *Cronic*, 466 U.S. at 654 n.11 (quoting *United States v. Decoster*, 624 F.2d 196, 219 (D.C. Cir. 1976) (MacKinnon, J., concurring)).

Whether the failure to introduce any mitigating evidence and the waiver of final argument in the sentencing phase of a death penalty case constitute ineffective assistance of counsel must be determined on a case-by-case basis. The failure to present mitigating evidence in a death penalty case does not necessarily constitute ineffective assistance of counsel, *see Darden v. Wainwright*, 477 U.S. 168, 184-87 (1986); *see also Moore v. Reynolds*, 153 F.3d 1086, 1105 (10th Cir. 1998), *cert. denied*, 526 U.S. 1025

(1999), although given the uniqueness of the death sentence, the absence of any mitigating evidence, combined with a waiver of oral argument, plainly raises a "red flag." When the waiver of final argument is part of a legitimate trial strategy, great latitude is given to the decision of the attorney. *Moore*, 153 F.3d at 1104.

However, where the waiver is not based on a sentencing strategy, or is based upon a decision called "strategy" which no reasonable observer could credit as involving any logically defendable analysis, the attorney may have performed in a deficient manner. *Smith v. Stewart*, 140 F.3d 1263, 1269 (9th Cir. 1998). An attorney's decision to present no evidence whatever in mitigation and, *in addition*, to offer no argument when his client faces the prospect of being sentenced to death may amount to a virtual abandonment of the adversarial process that results in injustice, thus demonstrating both deficient performance and prejudice. *Kubat v. Thieret*, 867 F.2d 351, 368-70 (7th Cir. 1989).

This court has found that counsel's failure "to investigate and present any mitigating evidence during the sentencing phase so undermined the adversarial process that [defendant's] death sentence was not reliable." *Austin*, 126 F.3d at 848. Where mitigating evidence was available, but not adequately investigated and not presented at sentencing, this "does not reflect a strategic decision, but rather an abdication of advocacy." *Id.* at 849.

It is indisputable that Cone's trial attorney presented no mitigating evidence at all and made no final argument; he did not even ask the jury to spare his client's

life. However, Cone's attorney testified at the post-conviction hearing that he had several strategic reasons why he decided to waive final argument, admittedly a "radical tactic" at the penalty phase of a capital case. First, he thought that he had presented to the jury during the guilt phase almost every mitigating circumstance available. He claimed that since the jury is charged to consider those factors in its penalty phase deliberations, he did not have to put the evidence on a second time. Second, he claims that he "sucker[ed]" the prosecution into putting on mitigating evidence of Cone's Bronze Star decoration from Vietnam without having Cone testify. Third, he claims he thought the trial judge had "lost control" of the case. Fourth, he claims that Cone told him he would "explode" if he got on the stand. Fifth, he explained that he made his penalty phase "closing argument" in his opening statement during the guilt phase, and therefore, did not need to make a closing argument. Sixth, he explained his use of a rather confusing and convoluted theory on how he planned to get the jury to find an illegal aggravating circumstance, which would be the basis for later having the whole penalty phase thrown out. Last, he claimed that he wanted to prevent the prosecutor from making one of his notorious "devastating" closing arguments.

While these post hoc justifications, given in testimony at Cone's post-conviction hearing, surely amount to *explanations* for counsel's silence at sentencing and may have been "tactical" decisions, they do not necessarily defeat Cone's claim that his attorney's refusal to plead for Cone's life amounted to constitutional ineffectiveness.

A trial lawyer accused of constitutional ineffectiveness for failing to act where action is ordinarily indicated

will almost always have a reason for declining to act. The reason will usually be called the lawyer's "strategy." But the noun "strategy" is not an accused lawyer's talisman that necessarily defeats a charge of constitutional ineffectiveness. The strategy, which means "a plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result," Random House Dictionary 1298 (Rev. ed. 1975), must be reasonable. It need not be particularly intelligent or even one most lawyers would adopt, but it must be within the range of logical choices an ordinarily competent attorney handling a death penalty case would assess as reasonable to achieve a "specific goal."

Here, the goal, the only conceivable goal, was to persuade the jurors not to sentence Cone to death. How counsel's refusal even to ask the jurors to do that could be called a reasonable strategy to achieve the goal, eludes us.

Even if we add up all of counsel's claimed strategic tactics, only one of which was apparently credited by the Tennessee appellate courts and the district court below – avoiding a "devastating" argument by the prosecutor – we think a reasonable attorney would have realized the absolute necessity of arguing for his client's life by making a closing argument. In addition, counsel had plenty of mitigating evidence at his fingertips; yet he failed to present it at the sentencing phase.

We reject out of hand, the argument that a competent attorney would determine that not presenting mitigating evidence of any kind and not making a final argument in a death penalty case is a justifiable "strategy" because doing so might trigger a "devastating" response by the

prosecutor – the sole reason assigned by the Tennessee courts for excusing counsel's silence. How much worse off could Cone have been if he were sentenced to death after a "devastating" argument by the prosecutor than if he were sentenced to death after the prosecutor's "mild" request that he be sentenced to death, which was followed by his own attorney's silence? Or, asked differently: How much more devastating for the petitioner could the prosecutor's "devastating" argument have been than the death sentence the petitioner got without such argument?

We can only imagine the effect on the jurors when Cone's defense counsel refused even to ask them to spare his client's life. They could only have inferred that Cone's counsel was, by his silence, acquiescing to the prosecutor's plea that Cone be sentenced to death. *See Stewart*, 140 F.3d at 1270. Cone may well have fared better if his counsel had left the courtroom entirely for the sentencing phase of the trial. If that had occurred, the jurors could not have inferred, as indeed they must have, that counsel's knowing and purposeful silence was an implicit agreement that justice required that Cone be put to death. When a man faces the gallows and his attorney sitting next to him declines even to ask the jurors to spare his life in the name of simple mercy, the attorney ought to have a most compelling reason for failing to speak – one that would incline a reasonable observer to credit as a sentencing strategy that is legally and factually justified. The reasons Cone's counsel has given are totally unreasonable, given the stakes. This was not "strategic" representation; it was nonrepresentation of the most deadly sort.

Under *Cronic*, a presumption of prejudice is raised by counsel's behavior; thus, Cone need not show actual prejudice. Essentially, Cone did not have counsel during the sentencing phase of his trial and thus the prosecutor's insistence that justice required that Cone be put to death was not subjected to "meaningful adversarial testing." *Cronic*, 466 U.S. at 656. We find that counsel's abandonment of Cone at possibly the most "critical stage of his trial" fell below an objective standard of reasonableness and prejudiced him, which resulted in the ineffective assistance of counsel under the Sixth Amendment. *Id.* at 659.

But the state of Tennessee has held that Cone's lawyer's behavior was not ineffective under *Strickland* and we may not disturb that ruling unless we are convinced that it constitutes a "decision that is contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). We conclude that Cone's counsel's refusal to offer any evidence in mitigation and refusal even to address the jurors to ask them to spare Cone's life because counsel feared the prosecutor might make a "devastating" argument denied Cone his Sixth Amendment right to counsel at sentencing and that the Tennessee court's conclusion to the contrary is an unreasonable application of the clearly established law announced by the Supreme Court in *Strickland*.

XI.

Conclusion

We **AFFIRM** the district court's refusal to issue a writ of *habeas corpus* with respect to the petitioner's conviction, but we **REVERSE** the district court's judgment as to the petitioner's sentence. We **REMAND** to the district court with instructions to issue a writ of *habeas corpus* vacating the petitioner's death sentence due to the ineffective assistance of counsel at sentencing, unless the state conducts a new penalty phase proceeding within 180 days after remand.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GARY BRADFORD CONE,	×	
Petitioner,	×	
	×	No. 97-2312-M1/A
vs.	×	
RICKY BELL,	×	
	×	
Respondent.	×	

ORDER DENYING MOTION FOR
EVIDENTIARY HEARING
AND
ORDER OF PARTIAL DISMISSAL

(Filed May 15, 1998)

I. INTRODUCTION

This matter is before the Court on petitioner's Motion for Evidentiary Hearing, filed October 14, 1997. Petitioner, Gary Bradford Cone, an inmate at Riverbend Maximum Security Facility in Nashville, Tennessee, filed a habeas petition pursuant to 28 U.S.C. § 2254, attacking his state conviction of two counts of first degree murder, and the death penalty imposed for those crimes. The respondent warden has filed an answer raising various grounds for dismissing the petition, and the petitioner has filed a motion for an evidentiary hearing as to certain claims. For the reasons set forth below, petitioner's motion is DENIED and the claims addressed in his motion are DISMISSED.

This document entered on docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 5/18/98.

II. STATE COURT PROCEDURAL HISTORY

A. *Facts of the Crime*

Examination of the record reveals the following undisputed facts. On Saturday, August 9, 1980, Cone robbed a jewelry store in Memphis, Tennessee of about $112,000 worth of expensive watches, rings and other jewelry. Shortly after the robbery, police received a description of the robber from the store manager, spotted petitioner driving his 1972 gray Oldsmobile, and followed him at a normal speed. The suspect became alarmed and led police on a high-speed chase through mid-town Memphis and into a residential neighborhood. There he abandoned his automobile, shot pursuing police officer B. C. Allen, and a citizen, John Douglas Clark, who challenged him, and tried to shoot a third citizen, Herschel Dalton, when Dalton refused to give Cone his car. During the afternoon of August 9, 1980, police seized Cone's car, but he eluded them only to resurface early the next morning in the same neighborhood at the door of Lucille Tuech's apartment. She refused him admittance to make a telephone call and he drew a pistol on her. In the meantime the police had inventoried the car's contents and discovered a large amount of cash, some of which was later attributed to an earlier robbery of a grocery store, an enormous quantity of drugs, and the jewelry store's stolen property.

On the afternoon of Sunday, August 10, 1980, Cone broke through the rear door of the nearby home of an

elderly couple, Shipley O. Todd and his wife, Cleopatra Todd. Mr. Todd was 93 years old and his wife was 79. Cone attempted to coerce them into helping him, and then killed them when they stopped cooperating with him. After the murders, relatives of the Todds became concerned because they were unable to contact the Todds at their home. Three days after the murders, the bodies of Mr. and Mrs. Todd were found in their home, horribly mutilated and cruelly beaten. The police found Cone's fingerprints and hair samples in the ransacked home. Cone then went to the airport and flew from Memphis to Florida, where he appeared at the home of an acquaintance on August 12, 1980. Cone was thereafter arrested on charges in Florida, and the Memphis police investigation led to his arrest and return to Tennessee on charges arising out of the August 9-10, 1980 crimes.

B. *Petitioner's State Court Trial Proceedings*

On August 19, 1980, a Shelby County Grand Jury indicted Cone for first degree murder in the perpetration of a burglary and first degree murder in the death of Shipley Todd, (case number B-74703), and first degree murder in the perpetration of a burglary and first degree murder in the death of Cleopatra Todd, (case number B-74702). *See* Addendum 1, Document 1, (State Court Record), at 2-8. On September 5, 1980, the grand jury indicted Cone for assault with intent to commit murder in the first degree against Dalton, (case number B-74898), assault with intent to commit murder in the first degree against Officer Allen, (case number B-74898), assault with intent to commit murder in the first degree against Clark

(case number B-74899), and robbery with a deadly weapon of the jewelry store, (case number B-74902). *Id.* at 11-19.

From April 14 to 23, 1982, Criminal Court Judge James C. Beasley, Sr., presided at a jury trial, which concluded with the jury finding Cone guilty on all charges and sentencing him to 10 to 25 years on the assaults, life imprisonment on the robbery, and death on the two murder indictments. *Id.* at 165-68. Cone appealed as of right to the Tennessee Supreme Court, which affirmed the conviction and sentence. *State v. Cone*, 665 S.W.2d 87 (Tenn. 1984), *cert. denied, Cone v. Tennessee*, 467 U.S. 1210 (1984). Addendum 1, Docs. 4, 7.

C. *State Court Collateral Proceedings – First Petition*

On June 22, 1984, Cone filed, through counsel, his first post-conviction petition attacking the conviction and death sentence. In that petition, he contended his rights had been violated under the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, and under various state laws, rules of court, and constitutional provisions. In particular, he claimed that his attorney had provided ineffective assistance of counsel by failing to: 1) advise him properly; 2) make timely objections; 3) conduct adequate voir dire of the jury; or 4) discuss penalty stage strategy. Addendum 2, Doc. 1 at 27-29.

On November 21, 1984, Cone's post-conviction counsel filed an amended petition claiming that the prosecutors engaged in misconduct during the closing arguments

of the guilt phase of Cone's trial by arguing that the jurors should reject Cone's drug-user defense[1] because the amount of money in the car tended to show that he was a drug seller, not a drug user, even though the prosecutors knew the money came from an earlier grocery store robbery. The amended petition further claimed that petitioner's trial counsel provided ineffective assistance by:

1) failing to offer proof of mitigating circumstances during the penalty phase of the murder trial; First Post-Conviction Petition, ¶ 11(a), Adden. 2, Doc. 1 at 51;

2) failing to make a closing argument during the penalty phase of the murder trial; First Post-Conviction Petition, ¶ 11(a), Adden. 2, Doc. 1 at 51;

3) failing to advise Cone regarding whether any privilege protected statements he made during examinations by Dr. Bursten, a state psychiatrist; First Post-Conviction Petition, ¶ 11(e), Adden. 2, Doc. 1 at 52;

4) failing to adequately investigate Cone's background and personal and medical history for mitigating evidence; First Post-Conviction Petition, ¶ 11(d), Adden. 2, Doc. 1 at 52;

5) failing to adequately advise Cone regarding his decision not to testify at either the guilt or penalty phase of the trial; First Post-Conviction Petition, ¶ 11(c), Adden. 2, Doc. 1 at 51.

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[1] Cone's defense was "amphetamine psychosis".

The state court held a hearing, and on September 19, 1986, denied Cone's petition. *See* Adden. 2, Doc. 1 at 105. Cone then appealed to the Tennessee Court of Criminal Appeals, claiming, *inter alia*, that counsel provided ineffective assistance:

1) by failing to offer proof of mitigating circumstances during the penalty phase of the murder trial; First Post-Conviction Petition Appellate Brief, ¶ II(c)4, Adden. 2, Doc. 2 at 26;

2) by failing to make a closing argument during the penalty phase of the murder trial; First Post-Conviction Petition Appellate Brief, ¶ II(c)5, Adden. 2, Doc. 2 at 28; and

3) by failing to conduct adequate cross-examination of the State's expert witnesses during the guilt phase of the murder trial; First Post-Conviction Petition Appellate Brief, ¶ II(c)3, Adden. 2, Doc. 2 at 25.

He also raised the claim that the prosecutors engaged in misconduct during the closing arguments of the guilt phase by arguing that jurors should reject Cone's drug-user defense because the amount of money in the car tended to show that he was a drug seller, not a drug user. First Post-Conviction Petition Appellate Brief, ¶ I, Adden. 2, Doc. 2 at 12.

On November 4, 1987, the Court of Criminal Appeals rejected these claims and affirmed. Adden. 2, Doc. 4. On December 21, 1987, Petitioner, through counsel, sought permission to appeal to the Tennessee Supreme Court, raising only the claims of prosecutorial misconduct, and if ineffective assistance based on counsel's failure to present proof of mitigation and failure to make a closing

argument during the penalty phase of the murder trial. Adden. 2, Doc. 5. On March 14, 1988, the Tennessee Supreme Court denied permission to appeal. Adden. 2, Doc. 7.

D. *State Collateral Proceedings – Second Petition*

On June 15, 1989, Cone filed, *pro se*, a second state post-conviction petition. On June 22, 1989, Cone filed a *pro se* amended petition. The trial court dismissed the petition as barred by the successive petition restrictions of Tennessee's post-conviction statute. On May 15, 1991, the Court of Criminal Appeals reversed, however, and remanded to permit Cone an opportunity to rebut the presumption of waiver. Adden. 3, Doc. 4.

On August 13, 1993, Cone's post-conviction counsel filed a second amended petition raising 35 claims of ineffective assistance of counsel.[2] On October 5, 1993, counsel filed a third amended petition, raising claims which were numbered 41 through 52. Claim 41 contended that the State had withheld exculpatory evidence tending to prove that Cone did suffer from drug-induced psychosis. Claim 44 contended that Cone's trial counsel provided ineffective assistance by failing to offer any proof of mitigating circumstances during the sentencing hearing. Claim 47 contended that the trial court violated Cone's Sixth Amendment rights by refusing to permit him to sit at counsel table with his attorney during trial.

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[2] A table comparing the ineffective assistance claims raised in Cone's post-conviction petition and this federal petition is attached as an Exhibit to this order.

Claim 48 contended that counsel provided ineffective assistance by improperly cross-examining the state's medical expert witnesses, and that Cone had been denied exculpatory evidence that would have enabled counsel to impeach their testimony. Claim 51 contended that death by electrocution amounts to cruel and unusual punishment in violation of the Eighth Amendment. On November 12, 1993, counsel filed a fourth amended petition raising no new actual claims, but arguing that the claims already presented in that proceeding were not barred by the waiver provisions of Tenn. Code Ann. § 40-30-112(b).

On April 24, 1994, the state trial court dismissed the petition under Tenn. Code Ann. § 40-30-112(b), holding that all grounds raised in the amended petition were barred as either previously determined or waived. Adden. 4, Doc. 1 at 230. On March 22, 1995, the Tennessee Court of Criminal Appeals affirmed. *Id.*, Doc. 5. On March 4, 1996, the Tennessee Supreme Court denied Cone's application for permission to appeal. *Id.*, Doc. 11.

Cone then filed a motion for rehearing, contending that the 1992 decision of *Capital Case Resource Center v. Woodall*, No. 01A01-9104-CH-00150, 1992 WL 12217, (Tenn. App. Jan. 29, 1992), had opened access to previously unavailable records from the prosecutor's file. *Id.*, Doc. 12. Cone argued under *Caldwell v. State*, 1996 WL 74160 (Tenn. Feb. 20, 1996), that claims only ascertainable after the *Capital Case Resource Center* holding constituted "late-arising" claims under state law. Cone argued that he should be permitted to have these claims considered on the merits. In his motion for rehearing, Cone also argued that his claims that depended on the hiring of expert witnesses and investigative services should also not be

deemed waived, because the Tennessee Supreme Court decision enunciating a procedure for obtaining such services during a post-conviction proceeding was not decided until 1995. *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995). On May 6, 1996, the Tennessee Supreme Court denied the motion for rehearing. Adden. 4, Doc. 13. On October 15, 1996, the United States Supreme Court denied Cone's petition for certiorari.

E. *Federal Court Habeas Petition*

Petitioner then filed a motion in the United States District Court for the Middle District of Tennessee to stay his execution pending appointment of counsel and the filing of this federal habeas petition. The Middle District Court transferred the case to this court, which granted the stay, appointed counsel, and permitted the filing of this petition.

III. CLAIMS FILED IN THIS PETITION

This petition asserts numerous grounds for relief. This order is concerned only with the claims on which Cone seeks an evidentiary hearing. Cone's motion seeks an evidentiary hearing on claims numbered 39, 40, 41, 61, and 65 in his habeas petition. The state has opposed this motion contending both that the claims do not merit a hearing under § 2254, and that the claims are mostly barred by Cone's procedural default. Cone contends that the claims are not procedurally defaulted.

A. *Law Governing Procedural Default*

Twenty-eight U.S.C. § 2254(b) states, in pertinent part:

> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) an application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.[3]

Thus, a habeas petitioner must first exhaust available state remedies before requesting relief under § 2254. *See, e.g., Granberry v. Greer,* 481 U.S. 129 (1987); *Rose v. Lundy,*

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[3] The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) (codified, *inter alia,* at 28 U.S.C. § 2244 et seq.) ("AEDPA"), substantially revised the procedural and substantive standards by which state prisoners can seek habeas relief from the federal courts. The quotation of 28 U.S.C. § 2254(b) is from the revised, post-AEDPA version of the subsection. For purposes of procedural default analysis, the changes to § 2254(b) are not significant.

455 U.S. 509 (1982). *See also* Rule 4, Rules Governing Section 2254 Cases in the United States District Courts. A petitioner has failed to exhaust his available state remedies if he has the opportunity to raise his claim by any available state procedure. *Preiser v. Rodriguez,* 411 U.S. 475, 477, 489-90 (1973).

To exhaust these state remedies, the applicant must have presented the very issue on which he seeks relief from the federal courts to the courts of the state that he claims is wrongfully confining him. *Picard v. Connor,* 404 U.S. 270, 275-76 (1971); *Rust v. Zent,* 17 F.3d 155, 160 (6th Cir. 1994). "[A] claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts which entitle the petitioner to relief." *Gray v. Netherland,* 116 S. Ct. 2074, 2081 (1996) (citing *Picard,* 404 U.S. at 271). " '[T]he substance of a federal habeas corpus claim must first be presented to the state courts.' " *Gray,* 116 S. Ct. at 2081 (quoting *Picard,* 404 U.S. at 278). A habeas petitioner does not satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) "by presenting the state courts only with the facts necessary to state a claim for relief." *Gray,* 116 S. Ct. at 2081.

Conversely, "[i]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Id.* When a petitioner raises different factual issues under the same legal theory, he is required to present each factual claim to the highest state court in order to exhaust his state remedies. *See Pillette v. Foltz,* 824 F.2d 494, 497-98 (6th Cir. 1987). He has not exhausted his state remedies if he has merely presented a particular

legal theory to the courts, without presenting each factual claim. *Id.* The claims must be presented to the state courts as a matter of federal law. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982). *Cf. Duncan v. Henry*, 115 S. Ct. 887, 888 (1995) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court."). *Cf. Gray*, 116 S. Ct. at 2081.

Moreover, the state court must address the merits of those claims. *Coleman v. Thompson*, 501 U.S. 722, 734-35 (1991). If the state court decides those claims on an adequate and independent state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, the petitioner is barred by this procedural default from seeking federal habeas review, unless he can show cause and prejudice for the default. *See Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

When a petitioner's claims have never been actually presented to the state courts, but a state procedural rule prohibits the state court from extending further consideration to them, the claims are deemed exhausted, but procedurally barred. *Coleman*, 501 U.S. at 752-53; *Teague v. Lane*, 489 U.S. 288, 297-99 (1989); *Wainwright*, 433 U.S. at 87-88; *Rust*, 17 F.3d at 160.

A petitioner confronted with either variety of procedural default must show cause and prejudice for the default in order to obtain federal court review of his

claim. *Teague*, 489 U.S. at 297-99; *Wainwright*, 433 U.S. at 87-88. Cause for a procedural default depends on some "objective factor external to the defense" that interfered with the petitioner's efforts to comply with the procedural rule. *Coleman*, 501 U.S. at 752-53; *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

A petitioner may avoid the procedural bar, and the necessity of showing cause and prejudice, by demonstrating "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. The petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime." *Schlup v. Delo*, 115 S. Ct. 851, 865-66 (1995) (quoting *Murray*, 477 U.S. at 496). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 115 S. Ct. at 867.

B. *Analysis of Petitioner's Claims*

In this case, analyzing procedural default has been made more difficult by the petitioner's confusing presentation of his claims, and the respondent's failure to articulate which specific claims are subject to which specific procedural default. Paragraphs 39, 40, 41, 61, and 65 of Cone's petition contain a total of fifty-one claims in subparagraphs, (39(a-k) and 40(a-rr)), upon each of which

petitioner claims entitlement to an evidentiary hearing.[4] Of these fifty-one claims, however, only four are both properly exhausted and not the subject of some procedural default during the state court proceedings. Cone's contention in claim 40(h), repeated at 40(qq), that his attorney provided ineffective assistance when he failed to present any proof in mitigation of the death penalty was decided adversely to Cone during the first

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[4] Cone's counsel divided the petition into paragraphs and subparagraphs, not all of which actually contain different claims. Subparagraph 39(b) and (c) simply consist of argument regarding the exculpatory effect of the eight allegedly exculpatory documents listed in subparagraph 39(a). Subparagraph 39(d) is an introduction to a *Brady v. Maryland*, 373 U.S. 83 (1963), claim based on the ten documents listed in subparagraph 39(e). Subparagraphs 39(f)-(h) actually enunciate the *Brady* claim based on those documents. Subparagraph 39(i) recites six documents which Cone's counsel assert reflect on the veracity of prosecution rebuttal-witness Ilene Blankman. Subparagraph 39(j) asserts a *Brady* claim based on evidence that money recovered from Cone's car was returned to the grocery store. Subparagraph 39(k) generally reasserts all of the previously asserted *Brady* claims. The Court construes these as four different claims:

1) a *Brady* claim that the prosecutor failed to reveal documents in the prosecutor's filed related to Cone's drug use;
2) a *Brady* claim based on the prosecution's failure to reveal documents in the FBI's possession related to Cone's drug use;
3) a *Brady* claim based on the prosecution's failure to reveal documents related to Blankman's testimony; and
4) a *Brady* claim based on the prosecution's failure to reveal that money seized from Cone's car was returned to the grocery store.

state post-conviction proceeding. Claim 40(i), that his attorney provided ineffective assistance by not making any closing argument at the penalty phase of the trial, was likewise decided against Cone on the merits during that same proceeding. Claim 39(j) duplicates claim 41. Cone contends that he was deprived of due process by the prosecutor's guilt-phase closing argument that jurors should reject Cone's drug-user defense because the amount of money found in Cone's car tended to show that he was a drug seller, not a drug user, even though the prosecutors knew the money came from an earlier grocery store robbery. This claim was decided on the merits adversely to petitioner during the first post-conviction proceeding, and was included in Cone's application of permission to appeal to the Supreme Court. Finally, claim 61, that electrocution is cruel and unusual, was decided adversely to Cone on his direct appeal from his conviction and sentence.

The remaining claims have never been presented on the merits to the Tennessee Supreme Court. Particular mention should be made of several claims. Cone's ineffective assistance claims 40(h), 40(j) through 40(gg), and 40(qq) are simply verbatim repetitions of claims he originally stated in the *pro se* state petition he filed on June 15, 1989, amended on June 22, 1989, and amended again on August 13, 1993. *See* Adden. 3, Doc. 1, at 28-31, 38-40; Adden. 4, Doc. 1, at 67-71.

Claim 40(g), that counsel provided ineffective assistance by failing to introduce evidence that Cone had won a Bronze Star in Vietnam, is frivolous in light of Cone's submission, during the trial phase of the first post-conviction proceeding, of proposed findings of fact asserting

that counsel did in fact obtain admission of this evidence. Adden. 2, Doc. 1 at 97. This evidence was admitted during the penalty phase of Cone's trial. Trial Trans. at 2123. Accordingly, this claim is DISMISSED.

Claim 40(r), that Cone's trial counsel had inadequate experience and expertise to handle a death penalty case is not an assertion of a Sixth Amendment violation. A Sixth Amendment claim requires a showing of deficient performance by counsel, and prejudice to the defendant from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). While counsel's experience is evidence on which a court might rely in evaluating counsel's performance, it is not in itself a basis for relief. Accordingly, this claim is DISMISSED.

Claim 40(x), that Cone's trial counsel provided inadequate advice regarding whether Cone should testify during the guilt and penalty phases of the trial, was decided adversely to Cone on the merits by the Tennessee Court of Criminal Appeals during the first post-conviction proceeding. Adden. 2, Doc. 4 at 8. Cone did not, however, present this claim to the Tennessee Supreme Court in his application for permission to appeal. Adden. 2, Doc. 5 at 2. He did later raise it as claim 15(n) in the August 1993 petition that was dismissed as procedurally barred. Adden. 3, Doc. 1 at 39.

Claims 40(a), (b), (c), (d), (e), and (f), all relating to trial counsel's alleged ineffectiveness in developing and presenting evidence regarding Cone's mental health and drug use, have never been presented to the state courts. Claim 40(mm), that counsel failed to conduct adequate cross-examination of prosecution witnesses has never

been presented to the state courts. Likewise, claim 40(oo), that counsel inadequately investigated and presented evidence regarding Cone's potential for living a worthwhile life in prison as a means of persuading the jury of the existence of a mitigating circumstances, [sic] has never been presented to the state courts.[5]

Claim 40(pp), that counsel inadequately cross-examined the state's medical experts, and that the State withheld exculpatory evidence with which to impeach them, was held waived on direct appeal of the first post-conviction petition. Adden. 2, Doc. 4 at 6. Petitioner did not include this claim in his application for permission to appeal from that ruling. He did later raise it as claim 15(af) in the August 1993 petition that was dismissed as procedurally barred. Adden. 4, Doc. 1 at 70.

Of the eleven *Brady* claims, only two, claims 39(a) and (i), were even arguably presented to the state post-conviction trial court. Claim 39(a) was raised as claim 20(d) in the June 22, 1989 *pro se* petition. Claim 39(i) was raised in claim 35 in the August 1993 petition. The state court held both claims waived and that decision was affirmed on appeal.

Cone now argues that his procedural defaults should be excused. This argument essentially reduces to two parts: 1) that the 1994 holding by the state post-conviction court that the ineffective assistance grounds were

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[5] Cone has presented the state courts with similar claim 40(ff), that his counsel provided ineffective assistance by failing to request an instruction on this issue. *See* Adden. 4, Doc. 1 at 70. This claim was held procedurally barred under Tenn. Code Ann. § 40-30-112.

"previously determined" constitutes a ruling on the merits of all of his ineffective assistance claims; and 2) that the inadequacy of the state post-conviction procedures precluded him from raising the claims, especially the *Brady* claims. Neither argument has merit.

Cone argues that since he presented these ineffective assistance claims to the state court, but through no fault of his own did not receive a full and fair hearing, he is not barred from presenting them in this petition and is entitled to an evidentiary hearing. This argument misconstrues both the applicable Tennessee law and the standard governing federal habeas review of procedurally defaulted claims.

The State post-conviction trial court set forth the following analysis in its 1994 ruling:

> The Court finds, after a careful and thorough review based upon the entire record including the direct appeal and the first Petition for Post Conviction Relief and the pleadings, affidavits, and briefs of respective counsel[,] that the Second Petition for Post Conviction Relief as amended must be dismissed because the grounds stated in the Petition as amended have been either previously determined or presumptively waived as a matter of law.
>
> The petition fails to state any new grounds that have not already been decided on direct appeal or the First Petition for Post-Conviction Relief. A distinction should be noted between a "ground" and a "factual claim" to support the ground. T.C.A. 40-30-105 states, to wit:

> "Grounds for Relief – Relief under this chapter shall be granted when the conviction is void or voidable because of the abridgement in any way of any right guaranteed by the constitution of this state or the constitution of the United States, including a right that was not recognized as existing at the time of the trial if either constitution requires retrospective application of that right."
>
> T.C.A. 40-30-111 states, to wit: "Scope of hearings" – the scope of the hearing *shall extend to all grounds* the petitioner may have, *except those grounds which the court finds shall be excluded because they have been waived or previously determined,* as herein defined." (Emphasis added).
>
> It is, then, clear that a "ground" is a constitutional right. "Facts" are alleged by the petitioner to support the "grounds". Facts that are merely cumulative or conclusory in nature are non-supportive and will be disregarded.
>
> In the Second Petition sub judice the petitioner employs the word "claim" to describe either a ground or a fact in support of the ground. This is somewhat confusing[,] but obviously an alleged fact is not a constitutional right, and there should be a distinction made in the manner in which the petition is drawn.

Adden. 4, Doc. 1, at 232.

The order then refers to former Tenn. Code Ann. § 40-30-112, which stated:

> When ground for relief is "previously determined" or "waived."

> (a) A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.
>
> (b)(1) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.
>
> (b)(2) There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

Tenn. Code Ann. § 40-30-112 (1990). The court then held:

> Ineffective assistance of counsel. This ground was previously denied on direct appeal and the First Petition for Post Conviction Relief. The claimed factual allegations herein are merely cumulative or have been presumptively waived for failure to present upon direct appeal or the First Petition For Post Conviction Relief.

Adden. 4, Doc. 1, at 233. This determination was explicitly affirmed by the Court of Criminal Appeals.

> In his first post-conviction petition, the appellant presented five factual allegations to support his constitutional claim of ineffective assistance of counsel. His second petition, on the other hand, listed thirty-five separate deficiencies in his trial counsel's performance. The trial court found that ineffective assistance of counsel is a single "ground for relief" as contemplated by the statute, *see* T.C.A. § 40-30-111, and that the issue of ineffective assistance of counsel was therefore previously determined. We agree with the trial court. A petitioner may not relitigate a

> previously determined issue by presenting additional factual allegations. We should not encourage post-conviction petitioners to invent new facts to revive an old issue which was unfavorably decided, nor should we allow petitioners to "sandbag" by reserving factual claims until their second or third petition.

Cone v. State, 927 S.W.2d 579, Adden. 4, Doc. 5, at 5.

Cone argues that this determination that the ineffective assistance ground was previously determined is not a finding of procedural default. This argument is mistaken. From the above decisions, it is clear that when a ground for relief, such a ineffective assistance of counsel, is raised in a Tennessee post-conviction petition, subsequent consideration of factual allegations supporting that ground are barred by the prior presentation of that ground. Cone's argument to the contrary is based on his mistakenly equating the federal habeas term of art "claim" with the Tennessee phrase "ground for relief."

Under § 2254(b), exhaustion is required of every single factual aspect of a claim, not merely of generalized assertions of constitutional error. *Pillette*, 824 F.2d at 497-98. The state court refused to consider the merits of the factual allegations supporting any further Sixth Amendment ineffective assistance ground in the 1993 petition because petitioner had already had an opportunity to present his contention, (whether described as a "claim" or as a "ground for relief"), that his attorney provided ineffective assistance.

By refusing to consider the later factual allegations on the merits, the state courts erected a procedural bar in this federal habeas proceeding, not to every possible

claim of ineffective assistance under the Sixth Amendment, but to the specific claims based on those particular factual allegations. That the state court does not use terms that parallel federal habeas analysis in describing the "claims" asserted in state post-conviction proceedings is irrelevant.[6]

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[6] In an analogous context, the Supreme Court, discussing the state court's obligation to state clearly when it is denying a claim on procedural grounds, noted that:

> [w]e encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim – every state appeal, every denial of state collateral review – in order that federal courts might not be bothered with reviewing state law and the record in the case.

Coleman, 501 U.S. at 739. Similarly, the Fifth Circuit has opined in upholding a procedural default defense:

> [w]e decline today to impose on the [Texas Court of Criminal Appeals] the need to pronounce some shibboleth or incant some magic words guaranteeing safe passage from a holding based on a state procedural bar to an alternative holding on the merits without infecting the opinion with "excuse" and thus dooming it to inadequacy. We likewise decline Amos' invitation to hold that a court's particular choice of words or phrases to reflect the shifting of its focus from a holding grounded on independent state law to an alternative holding based on federal law is dispositive when determining whether that state-law ground is adequate.

Amos v. Scott, 61 F.3d 333, 341 (5th Cir.), *cert. denied*, 116 S. Ct. 557 (1995).

Petitioner argues that by declaring the ground of ineffective assistance "previously determined" the state courts have admitted that his Sixth Amendment claims have been decided on the merits. Petitioner reasons that since he cannot be procedurally barred from raising claims decided on the merits, the state court has decided all of his ineffective assistance *claims* on the merits for purposes of federal habeas review.

The difficulty with petitioner's argument is that it is clear that almost all of the specific Sixth Amendment claims asserted in this petition were not addressed on the merits by the state courts. It is clear that the state courts interpreted the "previously determined" language as a type of procedural bar – a legal determination that certain claims resting on specific factual support should have been presented at the time the petitioner raised similar claims within a broad ground implicating the same constitutional right. Accordingly, for federal habeas purposes, the "previusly determined" category is a type of procedural default as to those claims.

Cone may contend that the state courts should describe all such procedural defaults as a type of waiver. This argument, however, merely amounts to an assertion that the state courts have misapplied state law in creating a procedural barrier to considering the merits of those claims. A federal court cannot refuse to honor an adequate and independent state ruling because it disagrees with the state court's interpretation of state law. Moreover, this argument merely amounts to a disagreement over the terminology used by the state court. Petitioner's attempt to recast state court terminology to make his

claims reviewable misconstrues both state and federal law.

Cone argues also that the Tennessee Supreme Court decision in *House v. State*, 911 S.W.2d 705, 713-14 (Tenn. 1995), issued after Judge Williams denied Cone's second amended state petition, changed the standard for waiver in Tennessee. According to Cone, prior to *House*, Tennessee courts applied a subjective standard for waiver that required a personally knowing and voluntary decision by the prisoner to waive the claim.[7] According to Cone, *House* changed this to find waiver based merely on non-presentation of a claim. This contention misconstrues both prior Tennessee caselaw and *House*.

House simply definitively resolved the issue of whether the phrase "knowingly and understandingly" enunciated a subjective test based only on the petitioner's personal awareness, or an objective test based on what his attorney reasonably should have known. 705 S.W.2d at 713-14. According to the Tennesse [sic] Supreme Court, "[w]aiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney." 705 S.W.2d at 714. Moreover, it is clear from *House* that the Supreme Court's decision was shaped by the existing Tennessee caselaw, and merely clarified that body of law. Indeed, the *House* decision parallels the result in Cone's state court cases.

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[7] Memorandum in Support of Petitioner's Motion for an Evidentiary Hearing, at 9 (citing *Wooden v. State*, 898 S.W.2d 752, 754 (Tenn. Crim. App. 1994)).

Furthermore, petitioner's argument that prior caselaw enunciated a subjective standard both conflicts with *House*'s analysis of that body of law and is not supported by the single case on which he relies. *See Wooden v. State*, 898 S.W.2d 752, 754 (Tenn. Crim. App. 1994)). In 1992, Wooden, a Tennessee prisoner, filed a third post-conviction petition seeking to invalidate his 1982 rape conviction based on allegedly exculpatory evidence in police files that were unavailable to him until after the decision in *Freeman v. Jeffcoat*, No. 01A01-9103-CV-00086, 1991 WL 165802 (Tenn. App. Aug. 30, 1991), *perm. app. denied*, (Tenn. 1992), made the Tennessee Public Records Law applicable to certain police records. The trial court dismissed Wooden's petition as barred by the former three year statute of limitations on Tennessee post-conviction petitions. *See* Tenn. Code Ann. § 40-30-102 (1990). The appellate court, in *dicta*, observed that "it is doubtful that the defense of waiver would apply" and then remanded the case because the state conceded that the prisoner was entitled to a hearing on whether the statute of limitations would bar claims based on allegedly exculpatory evidence released under the public records law. This case, therefore, does not stand for the proposition that Tennessee courts had adopted and uniformly applied a subjective test for waiver prior to *House*.

Moreover, *Wooden* was not even decided until after Cone filed his various state court petitions. Accordingly, his argument that his reliance on an existing body of state law in filing his petitions should excuse his waiver of his various claims is without merit. His argument that *House* is a retroactive change in Tennessee law is likewise unavailing. In essence, petitioner merely disagrees with

the way in which the Tennessee courts have applied Tennessee's post-conviction procedures to bar review of the merits of the most of his claims. This does not establish that the procedural bar does not exist.

Petitioner's arguments in support of overcoming this procedural bar closely resemble his arguments against its existence. With regard to his ineffective assistance claims, petitioner had the opportunity to raise each of the claims at issue when he first filed a post-conviction petition. Each of the asserted factual claims related to trial counsel's performance were ascertainable from the record when Cone's attorney filed his first post-conviction petition. Cone offers no real excuse for failing to raise those claims in his first post-conviction petition, apart from a rather conclusory argument that his post-conviction counsel was ineffective. It is clear that there is not right to effective assistance of counsel in a state collateral proceeding. *Coleman*, 501 U.S. at 752. Accordingly, an error committed by petitioner's post-conviction counsel is not attributable to the state so as to constitute cause for a default. Rather, according to *Coleman*, the petitioner in a state collateral proceeding "must bear the risk of attorney error that results in procedural default." 501 U.S. at 752-53. Thus, Cone's ineffective assistance claims, except for the [sic] those presented to the Tennessee Supreme Court in the application for permission to appeal the denial of his first post-conviction petition, are barred here.

As to the *Brady* claims, Cone also attempts to argue that those claims were improperly held waived by the state courts. The only claims that were presented to the state courts, however, were conclusory assertions that the

state had generally withheld exculpatory documents, and had withheld documents that might have been useful to impeach prosecution rebuttal witness Ilene Blankman. *See* June 22, 1989 Petition at ¶ 20(d), Adden. 3, Doc. 1 at 43; Aug. 13, 1993 Petition at ¶ 35, Adden. 4, Doc. 1 at 81. Of the eleven instant *Brady* claims on which Cone asserts entitlement to an evidentiary hearing, only claim 39(i) was specifically within the scope of the post-conviction proceeding claims. The other claims, having never been presented to the state courts, are now barred by the state post-conviction statute of limitations.[8] *See Hannah v. Conley*, 49 F.3d 1193, 1194-95 (6th Cir. 1995).

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[8] Tennessee law previously set a three-year statute of limitations for filing post-conviction petitions. *See* Tenn. Code Ann. § 40-30-102 (1990). The period of limitations for Cone's conviction began on the statute of limitations' effective date of July 1, 1986, and expired on July 1, 1989. *State v. Masucci*, 754 S.W.2d 668 (Tenn. Crim. App. 1988) (original statute of limitations began running on effective date of act for all convictions that were final before that date).

In 1995, Tennessee repealed the previous post-conviction statute and replaced it with a completely new statute containing a one-year limitations period. Tenn. Code Ann. § 40-30-202(a) (Supp. 1995). The new statute was effective May 10, 1995. *See* 1995 Tenn. Pub. Acts Ch. 207 § 3, as amended by 1996 Tenn. Pub. Acts ch. 995 § 10 (May 13, 1996). The Tennessee Supreme Court has recently held that the amended statute does not provide a new "one-year window" from the effective date of the act in which every defendant could file a petition. Rather, if the petition would have been barred by the three-year statute provided under the previous act, it is still barred by the 1995 amendments. *See Carter v. State*, 952 S.W.2d 417, 420 (Tenn. 1997). Cone filed his second state post-conviction petition on June 16, 1989, fourteen days before the post-conviction statute of limitations expired. The statute was tolled during the time the

It appears that petitioner contends that he can demonstrate cause for this procedural default because he did not have access to the documents supporting the defaulted claims until he utilized federal discovery procedures in this habeas case. This contention is without merit. The petition admits that the documents from claims 39(a), 39(i), and 39(j) were all made available to Cone during the second post-conviction proceeding. *See* Adden. 4, Doc. 1 at 104 (State's response to request for discovery during post-conviction proceedings, stating "The original file has already been made available to counsel for petitioner."). Moreover, the petitioner admits that these documents were available during the second proceeding. *See* Petition at 13, n.7 (noting 1992 change to Tennessee public records law making records available).

The argument that the state's post-conviction procedures were inadequate to provide Cone with the opportunity to present those claims also ignores Cone's own admission in his motion for rehearing before the Tennessee Supreme Court in his second post-conviction proceeding that the *Brady* evidence has been available to him since 1992. *See* Adden. 4, Doc. 12 at 1-2. His amended post-conviction petitions were not filed until August of 1993. Adden 4, Doc. 1 at 64. Yet, of the specific *Brady* claims raised in this case, only one was ever even arguably raised before the state courts. Cone's state post-conviction counsel apparently never utilized the Tennessee Public Records Act procedures to obtain the information,

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second petition was pending, and expired, at the latest, fourteen days after the March 4, 1996 denial of Cone's petition for rehearing in the Tennessee Supreme Court.

or did not consider the evidence to be of value if they did, in fact, obtain it. As discussed above, my mistakes made by Cone's state post-conviction counsel in handling that state petition cannot constitute cause under *Coleman*. By failing to present claims 39(a) and 39(j) to the state court, Cone procedurally defaulted those claims. He cannot demonstrate cause for this default.

Claim 35 in Cone's amended second post-conviction petition was held waived by the state court. This claim arguably parallels claim 39(i) in this petition. Cone asks this court to declare that the claim was not actually waived because he had no opportunity to uncover the facts supporting the claim during the *first* post-conviction petition. This contention is without merit, however, because of the conclusory manner in which Cone asserted the claim during the second post-conviction petition. Despite the admitted availability of the materials from the prosecutor's file, Cone never relied on any specific document, and never made any specific *Brady* claim before the state court. He therefore failed to establish any basis for rebutting the statutory presumption of waiver of this claim. Accordingly, this claim is also procedurally defaulted, and Cone has failed to establish cause for this default.

Moreover, even if Cone's argument amounted to cause for this default, he cannot establish any prejudice based on the withholding of the information related to Blankman's testimony. These six items of information were:

1) A letter from the prosecutor to Blankman confirming their earlier conversation and providing her statement;

2) A letter from the prosecutor to Blankman confirming her court appearance and again providing the statement;

3) An F.B.I. report describing an event *after* the trial in which Blankman, while eating at a public restaurant, did not respond when someone accused her of lying;

4) The presence in the F.B.I. file of a copy of a report by Dr. Jonathan Lipman;

5) The prosecutor's notes of a pre-trial interview with Blankman. These notes allegedly do not contain any reference to the statements Blankman afterwards made during her rebuttal testimony about her observations of Cone;

6) A letter from the prosecutors thanking Blankman for her testimony.

Petition at 16-17. None of these items fall within *Brady*, which requires the government to disclose to a criminal defendant evidence that is both favorable and material to guilt or punishment. *See United States v. Presser*, 844 F.2d 1275, 1281 (6th Cir. 1988) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987)). *See also United States v. Bagley*, 473 U.S. 667, 682 (1985); *United States v. Agurs*, 427 U.S. 97, (1976).

Items 3 and 6 concern post-trial events, and do not tend to prove any fact that would establish Cone's innocence. Items 1 and 2 also do not tend to prove any fact that is both favorable to Cone and material to his guilt or punishment. Item 5 consists not of information, but an absence of information. Cone attempts to turn this void into positive exculpatory evidence. This contention is

frivolous. Information is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial." *Id.* at 678. That Blankman's in-court testimony is absent from the prosecutor's pre-trial notes does not undermine confidence in the outcome of petitioner's trial, thus those notes are not material.

Moreover, to the extent that this document would have been useful to establish that Blankman had not previously told anyone the facts to which she testified at trial, this evidence was admitted at trial through the cross-examination of Blankman and through the cross-examination of officer Roby. *See* Trial Transcript at 1896-1905, 1943-45. This document would not have resulted in any appreciable further impeachment of Blankman's testimony and was, therefore, not material to Cone's guilt or punishment under *Bagley* and *Brady*. As this document was not material, Cone cannot demonstrate the prejudice necessary to overcome a procedural default of this claim. Alternatively, under § 2254(b)(2), this claim is completely devoid of merit, regardless of issues of exhaustion or procedural default.

As to the fourth item, the presence in the F.B.I. file of Dr. Lipman's report is not only not exculpatory, but is not even probative of anything. Cone argues that the presence of Lipman's report:

> demonstrat[es] that both Ilene Blankman as well as F.B.I. agent Flynn, both of whom testified against Mr. Cone, had been informed about the evidence presented by the defense at trial and what they were specifically being called to rebut, thus demonstrating that such witnesses were not disinterested, truthful witnesses, but specifically collaborating with the prosecution to present facts against Mr. Cone.

Petition, ¶ 39(I)(iv) at 17. This claim is entirely speculative and does not establish that the prosecutors withheld exculpatory information from the defense. Dr. Lipman was one of the experts who testified for the defense. His report on Cone's condition would naturally appear in the F.B.I.'s file. Its presence does not tend to make it more likely that the prosecution engaged in misconduct with regard to Blankman's testimony. As noted, Cone's trial counsel subjected Blankman to searching cross-examination in an attempt to demonstrate that her rebuttal testimony was a last-minute fabrication. This claim is simply an attempt to create a claim where none exists.

The evidence of Cone's guilt was overwhelming, and the material evidence that he was acting under the influence of amphetamine psychosis was, and continues to be, virtually nonexistent.[9] The allegedly exculpatory information on which he relies would not have cast any doubt

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[9] In this regard, the court should mention briefly that the eight items of supposed *Brady* material on which Cone relies in

on the testimony of Blankman. As to this claim also, Cone cannot establish cause for his procedural default and cannot establish a constitutional violation, even apart from that default.

¶ 39(a) are not exculpatory either. These items consist primarily of copies of fugitive alerts provided to various law enforcement agencies throughout the country during the hunt for Cone. They mention that Cone was a "hearvy drug user". Cone argues that this contradicted prosecution witnesses who testified that they did not observe Cone use drugs, did not observe any needle tracks on his body, and observed that his behavior was inconsistent with a person under the influence of any drugs. Agent Flynn testified that Cone admitted to using cocaine, Dilaudid, and Demerol. Flynn did not testify that Cone said anything about amphetamine abuse. Given that the issue at trial was not whether Cone had ever abused any drugs (he clearly had), but whether he was out of his mind on amphetamines at the time of the murders, this evidence does not devastate the state's case or even credibly impeach the state's witnesses. Cone's claims in this regard are exaggerated and devoid of merit. To the extent that the alerts were remotely relevant, they might have tended to prove that the police were initially cautious regarding the characteristics of a person who had committed several heinous crimes. Apparently, Cone's father made mention to a police officer during the initial investigation of Cone's *prior* drug use. Seemingly out of an abundance of caution, the police included this possible characteristic in their alert. Clearly, the evidence as subsequently developed during the investigation established that Cone's drug use was irrelevant to his commission of these offenses. Furthermore, Cone's reliance on the number of such alerts is misplaced. The probative value of each of these irrelevant items is not increased by their accumulation. Finally, Cone cannot establish that these items are actually not provided to him during the original criminal proceedings because his trial counsel is deceased and his file is not available.

Claim 65 in Cone's habeas petition, regarding his presence at counsel table, is also defaulted. Cone does not offer a reason for his failure to raise this claim in his first *post-conviction* petition, nor any basis for avoiding a procedural default. Finally, with regard to all of the procedurally defaulted claims, Cone has not demonstrated that he is actually innocent, either of the original crimes of murder, or of the death penalty. He thus cannot obtain review of those defaulted claims.

The remaining claims are not procedurally defaulted, and were decided on the merits by the state courts. These claims bear repetition here:

1) 40(h) (also (qq)) – Cone's trial counsel provided ineffective assistance when he failed to present any proof in mitigation of the death penalty.

2) Claim 40(i) – Cone's trial counsel provided ineffective assistance by not making any closing argument at the penalty phase of the trial.

3) Claim 39(j) (also 41) – Cone was deprived of due process by the prosecutor's guilt-phase closing argument that jurors should reject his drug-user defense because the amount of money in the car tended to show that he was a drug seller, not a drug user, even though the prosecutors knew the money came from an earlier grocery store robbery.

4) Claim 61 – electrocution is cruel and unusual punishment.

Dealing with the last claim first, this claim is without merit and does not require an evidentiary hearing.

> Electrocution has never been found to be cruel and unusual punishment by any American court. *See, e.g., In re Kemmler,* 136 U.S. [436,] 443-44 [1890]; *Ingram v. Ault,* 50 F.3d 898 (11th Cir. 1995); *Felker v. Turpin,* 101 F.3d [95,] 97 [(11th Cir.), *cert. denied* 117 S. Ct. 450 (1996)]; *Porter [v. Wainwright],* 805 F.2d [930,] 943 n. 15 [(11th Cir. 1986), cert. denied, 482 U.S. 918, 107 S. Ct. 3195, 96 L.Ed.2d 682 (1987)]; *Glass v. Louisiana,* 471 U.S. 1080, 105 S. Ct. 2159, 85 L.Ed.2d 514 (1985) (Brennan, J., dissenting from denial of certiorari) ("such claims have uniformly and summarily been rejected"). No legislatively authorized method of execution in the United States is outlawed in any jurisdiction by any currently-effective court decision. [*Gomez v.*] *Fierro,* 117 S. Ct. [285,] 285 [(1986)]; *Rupe v. Wood,* 863 F. Supp. 1307 (W.D. Wash. 1994), *vacated as moot,* 93 F.3d 1434 (9th Cir. 1996).
>
> The very practice of electrocution has been upheld by other courts within the past year, and there is no argument even plausible that there are differences in the level of "evolving decency" among the different circuits or states of the union, or over the last very few years.

In re Sapp, 118 F.3d 460, 464 (6th Cir.), *cert. denied* 117 S.Ct. 2536 (1997). *Accord, Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 464 (1947) (holding that subjecting a convict to electrocution a second time after a first attempt at execution failed was not cruel and unusual punishment), *Williams v. Hopkins,* 130 F.3d 333, 337 (8th Cir. 1997) (following *Sapp* and rejecting § 1983 claim that electrocution is cruel and unusual punishment); *Ingram v. Ault,* 50 F.3d 898, 900 (11th Cir. 1995); *Johnson v. Kemp,* 759 F.2d 1503, 1510 (11th Cir. 1985) ("The contention that death by

electrocution violates the Eighth Amendment is frivolous."); *Sullivan v. Dugger*, 721 F.2d 719, 720 (11th Cir. 1983) (denying motion for a TRO alleging that "the carrying out of appellant's death sentence by means of electrocution is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments"); *Spinkellink v. Wainwright*, 578 F.2d 582, 616 (5th Cir. 1978) (following *Klemmer* and finding cruel and unusual punishment argument without merit).

In deciding whether a particular form of capital punishment is unconstitutionally cruel and unusual, the federal courts "look to objective factors to the maximum extent possible. Among these factors are statutes passed by society's elected representatives. We presume that a punishment selected by a democratically elected legislature is constitutionally valid." *Campbell v. Todd*, 18 F.3d 662, 682 (9th Cir.) (holding hanging not cruel and unusual), *rehearing en banc denied*, 20 F.3d 1050 (9th Cir.), *cert. denied*, 511 U.S. 1119 (1994). Given that the Tennessee legislature has declared electrocution to be the form of capital punishment in this state, that capital punishment is not, in and of itself, cruel and unusual, *Gregg v. Georgia*, 428 U.S. 153 (1976), that many other states also impose death by electrocution, and that no court has ever held electrocution inherently cruel and unusual, this claim is legally without merit.

Furthermore, the court has reviewed the scientific paper on which Cone relies, Exh. C to Memorandum in support of Petitioner's Motion for Evidentiary Hearing. This paper establishes that electrocution is painful. What the paper fails to mention, however, is any estimate of how long a person remains conscious and could actually

experience pain while being executed in an electric chair. The paper disputes, *Id.* at 30, the contention by the chair's manufacturer that unconsciousness generally occurs in 1/240th of a second, but does not attempt to provide a correct figure. Regardless of the intensity of the pain inflicted by electrocution, a duration of 1/240th of a second cannot be said to be cruel and unusual, and petitioner has not carried his burden to demonstrate that he will survive for any longer period of time.

Most importantly, § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Given the state of the law as discussed above, it cannot be said that the Tennessee Supreme Court's rejection of this claim on direct appellate review "involved an unreasonable application of clearly established Federal law." Accordingly, this claim is without merit. Petitioner's third claim is also without merit. Cone contends that he was

deprived of due process at the guilt phase by the prosecutor's argument that the jury should conclude that Cone was a drug seller instead of a user based on the money found in his vehicle, even though the prosecutor knew the money originated from Cone's robbery of a grocery store. This claim exaggerates the importance of the prosecutor's statement and ignores the other evidence that Cone was indeed involved in selling drugs. This claim was raised and fully addressed during Cone's first post-conviction proceeding. At trial, the prosecution established that Cone's car was found to contain thee hundred thirty-nine dollars in cash in his wallet, Tr. at 1500, a huge quantity of drugs, so far beyond what could arguably be for one person's use that it required four pages of the trial transcript to list, Tr. at 1506-10, one thousand nine hundred thirty-two dollars in cash removed from the same suit bag containing the drugs, Tr. at 1512, a list of drugs, Tr. at 1513, and additional loose change, Tr. at 1513. The prosecutor argued at the closing of the guilt phase that the nineteen hundred dollars was evidence that Cone had been selling drugs rather than using them. The state court on post-conviction review held this remark to be improper but harmless. In particular, the state court noted that the primary evidence that Cone was engaged in selling drugs was the large quantity of drugs in the vehicle. Adden. 2, Doc. 4 at 4.

Under § 2254(d), Cone cannot establish that this decision involved an "unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States." A review of the evidence in the record supports that Cone's out-of-his-mind-on-amphetamines defense was not rejected by the jury

because the prosecutor accused him of being a drug seller, but because he lacked credible evidence that he had in fact abused amphetamines during any period close to the murders. The prosecution's arguments regarding these funds were simply too remote from the real issues in this case to have affected the jury's deliberations. As this claim is without merit, there is no need for an evidentiary hearing to consider additional evidence. Accordingly, this claim is DISMISSED.

Cone's Sixth Amendment argument based on his attorney's failure to offer proof of mitigation also does not require a hearing. As Cone has procedurally defaulted his claims based on counsel's alleged failure to investigate and develop proof of mitigation, this claim must be evaluated based on the mitigating evidence available to counsel at the time he made the decision. The Court of Criminal Appeals, on review of the first post-conviction petition, explained that counsel made a series of reasoned tactical and strategic decisions regarding the proof of mitigation available to him. Of that proof, the two expert witnesses had already testified, and counsel determined there was no point to presenting cumulative testimony.

Counsel determined that Cone's mother was an ineffective witness whose exposure to further cross-examination would harm her son's case more than it would help. Counsel further determined that testimony by other potential witnesses about Cone's past would merely have revealed further criminal activity of which the jury was unaware. As the state court found, "[t]here is nothing in the record to show that the testimony of these witnesses would have benefited the defense." Adden. 1, Doc. 4 at 8.

Cone does not present any facts in this petition to refute this conclusion. Moreover, it is clear that all of the legitimate mitigating proof available to Cone was introduced during the actual trial. Cone's attack on this proposition is again based on procedurally defaulted claims and allegations.

Strickland v. Washington, 466 U.S. at 687, establishes the standard for an ineffective assistance claim. A petitioner must show:

1. deficient performance by counsel; and
2. prejudice to the defendant from the deficient performance.

See id. at 687.

A prisoner attacking his conviction bears the burden of establishing that he suffered some prejudice from his attorney's ineffectiveness. *Lewis v. Alexander*, 11 F.3d 1349, 1352 (6th Cir. 1993); *Isabel v. United States*, 980 F.2d 60, 64 (1st Cir. 1992). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant." *Strickland*, 466 U.S. at 697. If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. *Id.* at 697.

To demonstrate prejudice, a movant under § 2255 must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Additionally, however, in analyzing prejudice,:

> the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

Lockhart v. Fretwell, 506 U.S. 364, 368 (1993) (citing *United States v. Cronic*, 466 U.S. 648, 658 (1984)). "Thus an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Fretwell*, 506 U.S. at 369.

In this case, Cone has failed to demonstrate any prejudice from the failure of his trial counsel to introduce any then-available evidence at his sentencing hearing. Cone's argument that counsel's decision harmed him is based largely on speculative assertions about the effect of further evidence on the jury's deliberations, and on even more speculative assertions about what might have happened if counsel had investigated other evidence of mitigation. The latter category of claims is procedurally barred, however, and Cone's belated attempts in this court to produce mitigating evidence is of no avail.

The state appellate court, in ruling on the merits of this claim, found that the supposed mitigating evidence counsel did not introduce would have had no affect on the jury's verdict. Cone has failed to allege any facts or arguments that would undermine confidence in the reliability of the jury's verdict, and has thus failed to demonstrate a reasonable probability that the proffer of the withheld testimony would actually have affected the

jury's decision. Moreover, he has failed to carry his burden to demonstrate that the verdict was fundamentally unfair or unreliable. Nor has he demonstrated that the state court's decision did not comply with the requirements of § 2254(d)(1).

This case does not involve the type of total abdication of representation condemned in *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997). Here, unlike *Austin*, counsel had already introduced some mitigating evidence, and his rejection of other evidence was based on specific analysis of the tactical effect of that evidence. This is unlike the situation in *Austin*, in which counsel simply decided that any efforts would be useless. That counsel miscalculated the jury's ultimate verdict does not turn otherwise unreviewable strategic decision-making into deficient performance. In evaluating an ineffective assistance claim, the court should not second-guess counsel's tactical decisions. *Adams v. Jago*, 703 F.2d 978, 981 (6th Cir. 1983).

Accordingly, Cone has failed to demonstrate that the state court's rejection of this Sixth Amendment claim "involved any unreasonable application of clearly established Federal law." This claim is, therefore, without merit. As Cone cannot surpass the threshold requirement of § 2254(d), he is not entitled to an evidentiary hearing under § 2254(e). This claim as to counsel's failure to introduce mitigating evidence is DISMISSED.

Similarly, Cone has failed to demonstrate any Sixth Amendment claim based on his counsel's decision to forego a closing statement during the sentencing phase. The state court found that counsel considered that the

closing argument made by one of the state court prosecutors was not so damaging as to require a response. Defense counsel considered the risk of a persuasive final response from the other more experienced state prosecutor to be so great that the defense would be better off relying on the opening statement counsel gave at the beginning of the sentencing phase. Cone fails to offer any basis for disputing the state court's determination that this decision was a tactical choice to foreclose rebuttal argument by the prosecution.

A review of the closing remarks by the first prosecutor confirm that they were relatively straightforward – simply a recitation of the existence of four aggravating circumstances. Trial Trans. at 2144-47. There was no dispute that three of these circumstances definitely existed,[10] and Cone presents no argument that any statement counsel might have made would have persuaded the jury to give greater consideration to the evidence of mitigation introduced during the guilt phase. The state court's decision was a reasonable application of Sixth Amendment standards to the facts presented in the state court post-conviction proceeding.

Cone now contends that he should be given a hearing on the ineffective assistance claims because, after the first

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[10] On direct review the Supreme Court held the fourth factor, knowingly creating a great risk of death to two or more people other than the murder victims, was not supported by the evidence because the robbery and assaults with intent to murder were not committed during the murders of the Todds. The court nevertheless held this error to be harmless beyond a reasonable doubt.

post-conviction proceeding, his original trial counsel suffered from a mental disorder that apparently culminated in his committing suicide. He offers no evidence beyond speculation, however, that this condition affected either counsel's original trial performance or the testimony he offered during the post-conviction proceeding. He has not offered any actual evidence of either deficient performance or prejudice affecting the fairness and reliability of Cone's trial or death sentence. Cone has not offered any evidence to support the conclusory allegation that counsel was incapable, during the first state court post-conviction proceeding, of remembering the basis for his trial decisions. Cone fails to point to any part of the trial record that contradicts counsel's post-conviction hearing testimony or any part of the record that is inconsistent with that testimony. Cone does not point to any portion of the post-conviction hearing transcript that shows that counsel acted or spoke as if he was incompetent, or to any references that would support an argument that counsel was simply fabricating his testimony.

Finally, these contentions are an attempt to resurrect the procedurally defaulted claims of inadequate investigation and preparation. The argument that counsel's tactical decisions regarding the penalty phase of the trial were deficient and prejudicial to Cone are based on retrospective research and speculation about the effect further evidence might have had on the jury. Additionally, most of these contentions are rooted in claims that were not presented during the first post-conviction proceeding. In effect, Cone is complaining, again, about the quality of his representation during that proceeding. As discussed

above, *Coleman* forecloses such claims, however disguised. The claims are without merit, and are dismissed.

Accordingly, as the above claims are all either procedurally barred or correct under § 2254(d)(1), disposition of those claims without an evidentiary hearing is proper. Rule 8(a), Rules Governing Section 2254 Cases in the United States District Courts. Petitioner's motion is, therefore, DENIED, and those claims are hereby DISMISSED.

Cone devoted considerable argument to his contention that he is entitled to an evidentiary hearing under *Townsend v. Sain*, 372 U.S. 293 (1963), and *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). As the Court has determined that the claims are without merit, and as Cone has not established that any decisions involved an unreasonable application of clearly established federal law, he is not entitled to an evidentiary hearing in any event. The Court, therefore, need not address the issue of whether or how the standards enunciated in *Townsend* and *Keeney* apply after the enactment of new 28 U.S.C. § 2254(e).

IV. CONCLUSION

For the reasons set forth above, petitioner's motion for an evidentiary hearing is DENIED, and the claims addressed in his motion are hereby DISMISSED.

IT IS SO ORDERED this 15 day of May, 1998.

/s/ Jon Phipps McCalla
JON PHIPPS McCALLA
UNITED STATES DISTRICT JUDGE

[Table Omitted In Printing]

STATE of Tennessee, Plaintiff-Appellee,

v.

Gary Bradford CONE,
Defendant-Appellant.

Supreme Court of Tennessee.

Jan. 23, 1984.

William M. Leech, Jr., Atty. Gen. and Reporter Gordon W. Smith, Asst. Atty. Gen., Nashville, for plaintiff-appellee.

John C. Dice, April Ferguson, Memphis, for defendant-appellant.

OPINION

HARBISON, Justice.

Appellant was convicted of murder in the first degree and murder in the perpetration of a burglary in connection with the homicides of an elderly couple, Shipley O. Todd and his wife Cleopatra Todd, in Memphis on August 10, 1980. He was also convicted of three charges of assault with intent to commit murder in the first degree upon three other persons and of robbery by use of deadly force upon a fourth. All of these offenses were shown to have occurred on August 9, 1980.

We have reviewed the evidentiary record and the numerous issues presented on appeal by counsel for appellant. We find none of these issues sufficient to warrant reversal of any of the convictions, and all of them are affirmed.

Appellant was sentenced to life imprisonment for the armed robbery and for a term of years upon each of the

assault charges. He was given the death penalty for each of the two murders. The record clearly warrants imposition of the death penalty under the circumstances of these homicides, and it could in no sense be deemed to be disproportionate, in our opinion.

The homicides were the climax of a series of criminal episodes commencing on August 9, 1980, when appellant robbed a jewelry store in Memphis of approximately $112,000 worth of expensive watches, rings and other jewelry. The manager of the jewelry store gave a description to the police, and an officer in an unmarked cruiser saw appellant driving his 1972 gray oldsmobile a short time after the robbery. He followed appellant at a normal speed, but the latter, apparently becoming alarmed, accelerated in an effort to escape. A high-speed chase ensued through mid-town Memphis and into a residential neighborhood. There appellant abandoned his automobile. He shot one of the police officers who attempted to arrest him, shot a citizen, John Clark, who challenged him, and drew a gun on a third citizen, demanding that the latter give appellant his automobile. The owner of the automobile fled, and appellant snapped his pistol several times, his ammunition having been exhausted. He not only threatened the owner of the automobile, but apparently was snapping his pistol at a police helicopter which was flying over the area to assist in his apprehension. Appellant eluded police during the afternoon of August 9, a Saturday. Early on the next morning, in the same neighborhood, he appeared at the door of a resident, Lucille Tuech. When she refused him admittance to make a telephone call, he drew a pistol on her. Later that afternoon he entered the home of Mr. and Mrs. Todd,

which was located a very short distance from the apartment house where Ms. Tuech lived and in the same residential area where the other shootings had occurred.

Mr. Todd was 93 years of age; his wife was 79. She had gone to church on the morning of August 10 and had returned. Apparently she had eaten a meal. At some time in the afternoon appellant entered the home, breaking a latch on the rear door. The bodies of both victims were found horribly mutilated and cruelly beaten three days later upon investigation instituted by anxious relatives. Appellant's fingerprints and hair samples were found in the home, which had been ransacked, and he apparently was able to steal enough money or other valuables from the home to fly from Memphis to Florida, where he appeared at the home of an acquaintance on August 12.

Appellant from the beginning has admitted committing the homicides and the other crimes involved. The only defense interposed on his behalf was that of insanity, or lack of mental capacity, due to drug abuse and to stress arising out of his previous service in the Vietnamese war, some eleven years prior to the events involved in this case. This proved to be a tenuous defense, at best, since neither of the expert witnesses who testified on his behalf had ever seen or heard of him until a few weeks prior to the trial. Neither was a medical doctor or psychiatrist, and neither had purported to treat him as a patient. Their testimony that he lacked mental capacity was based purely upon his personal recitation to them of his history of military service and drug abuse. A psychiatrist and a psychologist examined him upon orders of the trial court, and neither of them found any evidence of a stress syndrome or of excessive drug abuse.

Lay witnesses who saw him at or about the time of the homicides contradicted his statements to his expert witnesses as to the degree and extent of his drug abuse. The jury was clearly warranted in finding that appellant was not insane at the time of the criminal episodes involved here on August 9 and August 10, 1980.

The jewelry store robbery was apparently planned well in advance. On August 8, 1980, appellant stole a Tennessee license plate from a Memphis resident. He apparently taped this over the Arkansas plate on the rear of his vehicle, but later it was found inside his automobile after he had removed it. He changed clothes after the robbery and was dressed in a different costume at the time of the subsequent police chase. After the murders he shaved his beard and altered his appearance considerably. He had capacity obviously to book plane flights from Memphis to Birmingham and thence to Florida. A lady acquaintance with whom he stayed in Florida and who had known him for several months prior to the crimes involved here testified that he had not used drugs excessively during the times when he was with her, nor did he appear to be experiencing withdrawal symptoms or using drugs when he returned to Florida on August 12, 1980. A police officer who examined him in Florida and took hair samples from his body said that there were no visible needle marks or other external evidences of drug abuse on appellant's body.

All of the items taken by appellant in the jewelry store robbery were found in his abandoned automobile, together with some $2,400 in cash and a very large quantity of contraband controlled substances.

We do not deem it necessary to dwell further upon the factual background of the case, because the evidence is overwhelmingly sufficient to sustain the convictions on all of the charges. Indeed, as previously stated, appellant has admitted guilt of all of them, but has denied responsibility solely on the basis of lack of mental capacity. It was stipulated that there was no issue of self-defense in connection with the deaths of the Todds, both of whom were repeatedly beaten about the head until they died. Defensive wounds appeared on the arms and hands of both of them, and the bodies had apparently been moved or dragged to points inside the house where they would not be visible from either the front or the rear door. Appellant made a telephone call from the residence of the Todds to his sister in Chicago at 3:45 on August 10, 1980. In addition he gave the following information to one of his expert witnesses in undertaking to explain the homicides:

> "He described that he was at their house with the agenda of getting cleaned up, getting fed, so that he could flee the area. And in the course of his time there they ceased to cooperate with him, and he started to try to control them physically to cooperate, and that's all the detail I have. He has no more recollection of specifics after that.
>
> "Q. But there's no question that he told you that he did kill those two old people?
>
> "A. That's what he told me, yes.
>
> "Q. And they ceased to cooperate with him, is that what you said he told you. Right?

> "A. They became frightened, and that was not what he wanted them to do."

Other testimony indicated that the police had combed the area in which the Todds lived and in which the other shootings had occurred on Saturday afternoon, and that appellant had apparently concealed himself from them. They had even used tear gas on an abandoned residence in an effort to find him. There can be no question but that his killing of the Todds was in furtherance of his effort to escape from the crimes which he had committed on the previous day.

Appellant was thirty-three years of age. He was an honor graduate of the University of Arkansas and shortly before the events in question here had been accepted for admission into law school, scoring in the ninety-sixth percentile on a law school admission test. He had served in the armed forces from 1966 through 1969, and had one year's service in Viet Nam as a supply sergeant. He had received a bronze star for his service there and had been honorably discharged from the army. He went to college after his discharge. In 1972, however, after graduating from college, he was convicted of three separate armed robberies in Oklahoma, these covering a period from December 1971 through May 1972. He had been imprisoned in Oklahoma until the latter part of 1979. He had then returned briefly to his home in Arkansas and had gone to Hawaii for a time. The vehicle which he was driving on August 9, 1980 had originally been registered in his name, but was registered in the name of his mother on that date.

Appellant offered the testimony of two witnesses in support of his defense of lack of mental competence.[1] The first of these was Dr. Matthew Jaremko, a clinical psychologist at the University of Mississippi. He had interviewed appellant on two occasions for a total of about six hours, beginning in February 1982, less than two months prior to the trial. It was the opinion of Dr. Jaremko that appellant was suffering from post-traumatic stress disorder as a result of his experiences in Viet Nam, and that upon this was superimposed a serious drug-abuse disorder. Dr. Jonathan Lipman, a neuro- pharmacologist, testified that appellant, in his opinion, suffered from "chronic amphetamine psychosis" as a result of serious drug abuse. As previously stated, neither of these witnesses had ever known or treated appellant prior to the early part of 1982, and both of them based their testimony entirely upon what he told them as to the extent of his ingestion or injection of drugs. Not only was the weight of their testimony a question for the jury, but appellant's known pattern of conduct immediately before and immediately after the events in question here raised serious doubts as to the accuracy of their opinions, because he did not appear to be seriously under the influence of or experiencing withdrawal from drugs according to the testimony of several witnesses who saw him during August 1980. In addition, as previously pointed out, the State offered two witnesses whose qualifications equalled or exceeded those of appellant's experts, and neither of

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[1] Other than claiming his constitutional right to remain silent, appellant did not testify at either the guilt or the sentencing phase of the trial.

the State's expert witnesses found any basis for an insanity defense.

Counsel for appellant, who conducted the defense and has pursued the appeal in this case most diligently, has raised numerous issues for our consideration. After carefully considering them, however, we are of the opinion that none of them warrant our interference with the jury verdict and the judgment of the trial court rendered thereon. In addition to overruling the issues presented as to the sufficiency of the evidence, we will comment briefly upon the other issues raised on appeal, although not necessarily in the order presented in the briefs.

Appellant has assigned error upon the failure of the trial court to grant individual *voir dire* of a juror, Floreine C. Dragon. This juror indicated that she was taking some medication at the time of the trial. Defense counsel requested that the other prospective jurors be sequestered so that he could examine the juror individually and avoid embarrassing her. The trial court denied this request, and we are of the opinion that this ruling was within his discretion. There was nothing necessarily embarrassing in questioning the juror about her medication as a part of the group. She apparently served on the jury without difficulty or incident. At one point during the trial she was questioned privately, as were other jurors, concerning some newspaper materials which had been furnished to the jury during a weekend recess. Nothing in her testimony at that time or in any post-trial affidavit indicates that she was not competent to serve as a juror or that appellant was prejudiced in any way by the ruling of the trial judge with respect to her *voir dire* examination.

Error is also assigned on the *voir dire* examination of five other persons who were excused by the trial judge for cause when they expressed irrevocable and unconditional refusal to consider the imposition of the death penalty. We have reviewed carefully the examination of each of these prospective jurors, and in our opinion the trial judge acted properly in excusing them. *See Houston v. State*, 593 S.W.2d 267, 272 (Tenn.1980).

During a weekend recess of the lengthy trial, a court officer furnished members of the jury with a Sunday newspaper. He had clipped from this all news stories which he observed concerning the trial and its incidents. However, in the sports section, there was a story about one of the witnesses who had been shot by appellant on August 9, 1980. In a magazine story there was also a brief reference to a double murder of an elderly couple in mid-town Memphis. This was merely a passing reference which did not refer to the names of the victims or of appellant.

The trial judge conducted an individual examination of the jurors on their exposure to the magazine article. Only one juror had even read that article, and none of the jurors had read anything in the newspaper which they associated in any way with the case on trial. They were not separately examined about the article on the sports page, but apparently none of them had taken note of it or were affected by it in any way. In all events, that article simply recounted the testimony of a witness, John Douglas Clark, who had testified on the previous Friday. It contained nothing with which the jurors were not already fully familiar. We find no error in connection with

the ruling of the trial judge and agree that a mistrial was not justified upon the basis of these news items.

A number of issues are presented concerning rulings made by the trial judge during the course of the trial. One of these involved an objection by counsel for appellant to the cross-examination of Dr. Lipman. That witness testified that all he knew about appellant's history was what appellant had told him. He admitted on cross-examination that if appellant had given different information to other doctors, this might affect his opinion. Apparently appellant did give other information to the State's expert witnesses, or they obtained other information independently, because their opinions differed greatly from that expressed by Dr. Lipman. The cross- examination was properly permitted. Further, the trial judge properly allowed the expert witnesses called by the State to testify concerning statements made to them by the accused with reference to his use of drugs. Neither witness quoted any incriminating statements by appellant, insofar as the facts of the case were concerned. At two points in the record references were made to the fact that these witnesses had examined appellant upon orders of the court. We find no statement, however, that they were "the Court's doctors," as alleged in the brief of appellant. The issue is without merit.

Equally without merit is the contention that the trial judge permitted three witnesses to testify for the State on rebuttal. It was insisted by appellant that these witnesses should have been offered during the State's presentation in chief. All of them, however, directly and sharply contradicted the contention of appellant that he was "out of his mind" as a result of drug abuse on the weekend in

question, and that he was experiencing severe and extreme symptoms of drug withdrawal after the crimes for which he was on trial.

Error is assigned upon the admission of photographs of the homicide victims. The trial judge excluded all photographs which showed the facial features of the two deceased persons in any detail. The photographs which were admitted simply showed portions of the house, and in some of them the bodies of the victims could be seen, but none of the photographs was gruesome nor did the prejudicial effect of any outweigh its probative value.

Counsel for appellant insists that the prosecuting attorney made an improper reference to a motion *in limine* which had been ruled upon by the trial judge. That motion involved some of the photographs just discussed. When counsel for the prosecution reached the point in trial when he wished to introduce photographs of the Todd residence, he mentioned to the court that he was coming to material which had been the subject of the pre-trial motion. At that point the judge excused the jury. The conduct of counsel for the prosecution was entirely proper. There was no attempt to suggest to the jury what the subject of the pre-trial motion had been or the ruling of the court thereon. The assignment is overruled.

There are numerous other assignments in which counsel for appellant insists that the prosecuting attorneys were guilty of improper conduct in the presence of the jury. We have examined each of these, and find none of them to warrant reversal. One improper remark was made, as to which the trial judge offered to give curative instructions to the jury. Counsel for appellant declined

these. In our opinion no remarks made during the course of the trial concerning counsel for either side could possibly have affected the results. The same is true with respect to alleged improper argument by counsel for the State. One or two brief comments were made in the heat of argument which probably should not have been made, but these either were not objected to at the time or were legitimate inferences to be drawn from the proof. We accordingly overrule issues two, three and six as presented in appellant's brief.

We find no merit to the assertion by appellant that the indictments in this case were insufficient and find no error with respect to the jury instructions. Likewise we find without merit the insistence that the State failed properly to produce witness statements for use by counsel for appellant on cross-examination. The State produced all of the statements which it had. The reference by counsel for appellant simply has to do with some summaries of witness interviews made in a general police report. There is no showing that any of the witnesses referred to ever saw or adopted any of the materials contained in this report. Issues seven, fourteen and fifteen are overruled.

We find no substance to the contention that the State was guilty of improper or selective prosecution in this case by not offering a life sentence to the accused in pretrial negotiations. We also overrule four issues addressed to the alleged invalidity of the death penalty in this state. All of these contentions have been considered in depth by this Court in numerous reported decisions, and they do not warrant further discussion here. *See generally State v. Austin*, 618 S.W.2d 788 (Tenn.1981); *State*

v. Pritchett, 621 S.W.2d 127 (Tenn.1981); *Houston v. State*, 593 S.W.2d 267 (Tenn.1980).

The final issue presented by appellant is whether a new sentencing hearing is justified because of insufficiency of the evidence to support one of the aggravating circumstances found by the jury. After careful consideration we are of the opinion that if any error was committed by the jury, it was harmless beyond a reasonable doubt in view of multiple aggravating circumstances which were clearly established.

In the guilt phase of the case the jury found that appellant was guilty of murder in the first degree as a matter of common law and also of felony-murder in the perpetration of burglary. The latter, in itself, is one of the statutory aggravating circumstances warranting the death penalty. T.C.A. § 39-2-203(i)(7). In reporting aggravating circumstances at the end of the sentencing hearing, however, the jury did not repeat this particular circumstance although it is abundantly established by the evidence. The jury did find, however, three other aggravating circumstances which were clearly shown by the evidence. The first of these was that the accused had previously been convicted of one or more felonies involving the use or threat of violence to the person. T.C.A. § 39-2-203(i)(2). As mentioned previously, it was proved that appellant had been convicted of three separate armed robberies in Oklahoma in 1982.

The jury also found that the murders in question were especially heinous, atrocious, or cruel in that they involved torture or depravity of mind as provided in

T.C.A. § 39-2-203(i)(5). The evidence abundantly established that both of the elderly victims had been brutally beaten to death by multiple crushing blows to the skulls. Blood was spattered throughout the house, and both victims apparently had attempted to resist, because numerous defensive wounds were found on their persons. The only excuse offered in the entire record for this unspeakably brutal conduct by the accused was that these elderly victims had at some point ceased to "cooperate" with him in his ransacking of their home and in his effort to flee from arrest. As previously stated, it was stipulated by counsel for appellant that there was no issue of self-defense even remotely suggested. The deaths of the victims were not instantaneous, and obviously one had to be killed before the other. The terror, fright and horror that these elderly helpless citizens must have endured was certainly something that the jury could have taken into account in finding this aggravating circumstance.

The jury also found that the accused committed the murders for the purpose of preventing a lawful arrest or prosecution, an aggravating circumstance specified in T.C.A. § 39-2-203(i)(6). This circumstance was established not only by the testimony of police officers but by appellant's own statement to his expert witnesses.

It thus appears that four aggravating circumstances were indisputably established by the record, and three of these were reported by the jury at the end of the sentencing hearing. The jury also reported another aggravating circumstance, T.C.A. § 39-2-203(i)(3) as follows:

> "The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during his act of murder. . . . "

It is clear from the record that on the afternoon of August 9, 1980, the accused shot two persons and attempted to shoot a third in escaping from an armed robbery after a high-speed automobile chase. On the next morning he terrorized Ms. Teuch and some hours later killed Mr. and Mrs. Todd. There is considerable logic and plausibility to the finding of the jury that the acts of murder were committed during the course of an attempted escape from this crime spree, and certainly more than two persons were in danger.

We are of the opinion, however, that generally the statute does not contemplate an extended criminal episode, but contemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based.[2] We are therefore doubtful that the record in the present case sustains the jury verdict as to this aggravating circumstance. Nevertheless, where three others were clearly found by the jury and the record demonstrates a fourth, we are of the opinion that the jury finding with respect to this aggravating circumstance, if erroneous, was harmless

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[2] There could be situations where substantial periods of time might be involved, such as in the taking of hostages or the hijacking of a plane or other vehicle. It is unnecessary here to attempt to define all possible fact situations which might be covered by this statute. It was held applicable in *State v. Workman*, 667 S.W.2d 44 (Tenn.1984) where an escaping robber killed one police officer and fired at two others.

beyond a reasonable doubt and does not warrant the granting of a new sentencing hearing. In this respect, the case differs markedly from *State v. Pritchett*, 621 S.W.2d 127 (Tenn.1981), in which there were only two aggravating circumstances found and the evidence did not support one of these. In the recent case of *State v. Workman*, 667 S.W.2d 44 (Tenn.1984), the Court upheld a death sentence where there was some question as to one of the aggravating circumstances found by the jury. The Court found that the validity of the sentence would not be affected even if the jury had erred as to one circumstance where numerous others were clearly established.

Pursuant to T.C.A. § 39-2-205 we have reviewed the sentence of death in this case and are of the opinion that it is not in any way disproportionate under all of the circumstances, including the brutal murders of two elderly defenseless persons by an escaping armed robber who had terrorized a residential neighborhood for twenty-four hours.

The judgment and sentence are affirmed at the cost of appellant. Unless otherwise ordered by this Court or other proper authority, the sentence will be carried out as provided by law on June 29, 1984.

Justice Brock concurs in affirming the conviction in this case but dissents with respect to the imposition of the death penalty for reasons stated in his dissenting opinion in *State v. Dicks*, 615 S.W.2d 126, 132 (Tenn.1981).

FONES, C.J., and COOPER and DROWOTA, JJ., concur.

BROCK, J., partial dissent.

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT JACKSON

SEPTEMBER 1987

GARY BRADFORD CONE, APPELLANT	)	No. 79
	)	Shelby Criminal
	)	Honorable Arthur T. Bennett, Judge
VS:	)	
	)	(Post Conviction Relief)
STATE OF TENNESSEE, APPELLEE	)	(Filed Nov. 4, 1987)

FOR THE APPELLANT:

James D. Kopernak
1246 Union Avenue
Memphis, Tenn.

Katherine Witherspoon
P. O. Box 11652
Memphis, TN

FOR THE APPELLEE:

W. J. Michael Cody
Attorney General
Nashville, Tenn.

Gordon W. Smith
Assistant Attorney General
Nashville, Tenn.

Edgar A. Peterson, IV
Assistant District Attorney
201 Poplar Ave., Third Floor
Memphis, Tenn.

AFFIRMED

LLOYD TATUM, SPECIAL JUDGE

OPINION RELEASED: NOV 4 1987

OPINION

This is an appeal by Gary Bradford Cone from a judgment denying post conviction relief. The appellant

was convicted of first-degree murder and the death penalty was imposed. He was also found guilty of several other offenses. On direct appeal, the Supreme Court of Tennessee affirmed the conviction. *State v. Cone*, 665 S.W.2d 87 (1984). The opinion of the Supreme Court summarizes the facts and we will not repeat them here except insofar as is necessary to discuss the issues presented.

The first issue presented is:

> " The improper final arguments of both prosecutors for the State at the conclusion of the trial to determine guilt or innocence affected the verdict of the jury to the prejudice of the defendant."

The appellant was convicted of beating an elderly couple to death on August 10, 1980. He was given the death penalty for each of the two murders.

On August 9, 1980, the appellant robbed a jewelry store in Memphis. In a high-speed chase after the jewelry store robbery, the appellant abandoned his automobile. In the automobile there was found a great quantity of assorted drugs. The list of these drugs is composed of four pages in the transcript of the original trial.

Officers also found the sum of $2,459.94 in the appellant's abandoned automobile. At the time of the trial, the appellant was under indictment for the robbery of a Big Star grocery store from which $1,893.72 was taken. The Big Star robbery also occurred on the day before the murder of the two elderly people. The record does not reveal the source of the rest of the money that was found in the abandoned automobile ($566.22).

It might be said that the proof that the appellant killed these two victims is conclusive. At trial, the appellant admitted committing these homicides and the other crimes involved.

The only defense interposed by him was that of insanity, or lack of mental capacity, due to drug abuse (chronic amphetamine psychosis) and to stress arising out of his previous service in the Vietnamese War (Vietnam Veteran Stress Syndrome). Hence, it was his theory that he was a drug addict. It was the prosecution's theory that the appellant was not a drug addict.

The following occurred during the opening argument by the State at the guilt phase of the trial:

> "GENERAL PATTERSON: Has an automobile that – I've got a '73 automobile. How does he do all this? I'm not trying to be absurd, but he says he's a drug addict. *I say balony.* (sic) *He's a drug seller.* Doesn't the proof show that? Well, let's see what we found in this car – (emphasis added)
>
> MR. DICE: I want to object, if Your Honor please, for the record.
>
> GENERAL PATTERSON: Let's see what –
>
> THE COURT: Excuse me.
>
> MR. DICE: Not indicted. Not charged. Not one piece of evidence.
>
> THE COURT: Yes, I'm going to sustain the objection to any argument along the line of drug selling, General. I think that's improper argument.

GENERAL PATTERSON: For a point of clarification, I can argue an inference from the fact, can't I?

THE COURT: Yes, but you can't argue the inference from the fact that someone has been violating the law by selling drugs, I think, General. So, I'm going to have to sustain the objection to that."

After the State's opening argument, defense counsel argued the defense theory that the appellant was insane due to drug abuse. There was also argument by the defense concerning the appellant's indigency. In response, the State argued as follows:

"GENERAL STROTHER: The last time that I heard anything about his client, his client had over $2,000 cash on him. His client had flown to Hawaii. His client was living in Key West. His client had bought a motorcycle. His client had an automobile. That's just lawyer talk, that indigency business.

He say, (sic) well, the State shows no evidence. Where are the indictments? Where are the charges for drug sales? There aren't any charges for drug sales, but that doesn't mean that you can't look and question in deciding whether or not this man was, in fact, a drug user, or why he had those drugs. Did he just have those drugs, or did he have those drugs and thousands of dollars in that car? Among those drugs are there only the drugs he used? How do we know if he used drugs? The only thing that we ever had that he used drugs, period, is the fact that those drugs were in the car and what he told people. What he told people. But according to even what he told people,

there are drugs in there he didn't even use. A whole page of drugs. Barbiturates that he didn't even use. Why would those be there? Why would he have those in there? Why? *Common sense, and a reasonable answer to that? Same place that $2,000 came from.*" (Emphasis added)

The above-quoted argument by the State is the basis of the complaint of prosecutorial misconduct. The appellant says that the prosecuting attorneys knew, or should have known, that most of the money found in the appellant's abandoned vehicle came from a robbery that occurred on August 9, and not from the sale of drugs. At the post-conviction hearing, one of the prosecuting attorneys testified that he was aware of the indictment for the Big Star robbery but had not familiarized himself with the details because the District Attorney's office had no intention of prosecuting that case. The trial court held that the reference to the money was not made with an improper intent.

The test for alleged improper prosecutorial misconduct is, "whether the improper conduct could have affected the verdict to the prejudice by the defendant." *Judge v. State*, 539 S.W.2d 340, 344 (Tenn.Crim.App.1976). The great quantity of assorted drugs found in the appellant's abandoned automobile supplied a strong inference that the drugs were possessed for resale. *State v. Dowell*, 705 S.W.2d 138 (Tenn.Crim.App.1985); *Wells v. State*, 509 S.W.2d 520 (Tenn.Crim.App.1973), *affm'd*. 517 S.W.2d 755. In view of the abundant other evidence that the appellant was a drug salesman, we find that the reference to the money was relatively insignificant, although it should have not been made. There was abundant evidence, not

referred to in the above-quoted argument, that the appellant was not a drug addict. We find beyond a reasonable doubt that the reference to the money did not affect the verdict of the jury in either the guilt or punishment stage of the trial.

In the second issue, the appellant asserts that trial counsel was ineffective. The appellant alleges that his trial attorney rendered ineffective assistance by (1) failing to interview the State's rebuttal witness, Ilene Blankman, prior to trial; (2) in failing to object to the improper argument of General Strother implying that the petitioner was a drug dealer; (3) inadequate cross-examining the State's expert witnesses; (4) failing to introduce mitigating evidence at the sentencing phase of the trial; and, (5) failing to make a final argument at the sentencing phase. We will discuss each of these contentions.

FAILURE TO INTERVIEW WITNESS

It is admitted that counsel failed to interview Ilene Blankman, a rebuttal witness for the State, prior to trial. Briefly, she testified that she was the appellant's girlfriend, that the appellant was not a drug addict and had no needle marks on his body. The trial court found that counsel knew Ms. Blankman was going to testify for the State. Defense counsel discussed this fact with the appellant and the appellant strongly insisted that defense counsel not talk with her. She was a former girlfriend and the appellant informed defense counsel in detail regarding his relationship with her. Defense counsel cross-examined her. There is no showing that her testimony would have been different had defense counsel talked

with her before trial or that the failure to interview in any manner prejudiced the appellant. The trial court found that even if it could be said that counsel's performance was deficient in this regard, such deficiency was not prejudicial and did not render the assistance of counsel ineffective. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984).

FAILURE TO OBJECT TO IMPROPER ARGUMENT

The appellant contends that his attorney failed to object to the above-quoted argument of General Strother at the guilt phase implying that the petitioner was a drug dealer. As above stated, the argument by the State was legitimate in context of this case: there was an issue as to whether the drugs found in the appellant's car were possessed by the appellant for his own use or his inventory as a drug dealer. Also as stated, the argument concerning the amount of money in the car might have been objectionable but was relatively insignificant. The trial attorney testified that he did not object to the argument because he did not want to reemphasize it to the jury. The trial court accredited defense counsel's testimony in this regard. Counsel's strategic decision not to object was a legitimate trial tactic, the exercise of which does not furnish a basis for finding counsel's representation deficient. See *State v. Martin*, 627 S.W.2d 139, 141 (Tenn.Crim.App.1981). Moreover, the reference to the amount of money was relatively insignificant when considered with all of the other evidence above referred to. Hence, the failure to object did not prejudice the appellant. The Trial Court concluded that this tactic did not amount to ineffective assistance of counsel.

INADEQUATE CROSS-EXAMINATION OF EXPERT WITNESSES

The appellant contends that trial counsel failed to adequately cross-examine the State's expert witnesses on the insanity issue. This issue was not raised in the post conviction petition, nor was there any evidence on this issue at the post conviction hearing. An issue raised for the first time on appeal is waived. *Ellison v. State*, 549 S.W.2d 691, 694 (Tenn.Crim.App.1976). Moreover, the record fails to support the petitioner's contention on appeal.

FAILURE TO INTRODUCE MITIGATING EVIDENCE

The appellant contends that counsel's representation was insufficient because he failed to introduce any mitigating evidence at the sentencing phase. The appellant stated that two medical experts who testified for the defense at the guilt phase of the trial should have been reintroduced to testify at the penalty phase as to the appellant's mental state at the time the crimes were committed. He also contends that his mother should have been reintroduced to testify concerning his early childhood.

The trial court accredited the testimony of the defense attorney during which he explained that this evidence had been presented during the guilt stage of the proceeding. Trial counsel was aware that the trial judge would instruct the jury that it should consider mitigating circumstances proved at the guilt stage of the trial. Defense counsel also testified that the appellant's mother

did not make a good witness at the guilt stage of the trial and in his judgment, the best tactic was to not subject her to further cross examination.

The appellant also complains because defense counsel did not introduce other relatives and associates to testify concerning his early childhood. Defense counsel testified that these potential witnesses were interviewed by him and that he concluded that there was a danger that cross examination would elicit additional criminal activity on the part of the appellant. There is nothing in the record to show that the testimony of these witnesses would have benefited the defense. In the absence of this showing, we will not presume that trial counsel erred in not calling them as witnesses. See *State v. Martin, supra.*

The appellant also states that his mother should have been called as a witness to enable her to make "a plea to the jury for her son's life." If the appellant means by this that the mother should have been permitted to make an emotional appeal or speech to the jury, this practice is not permitted in our system.

The appellant also argues that a letter written to the appellant by a member of the family of the victim should have been introduced at the penalty phase. One member of the victim's family, who wrote this letter, apparently forgave him for committing these offenses. We fail to see how a forgiving letter written by someone else would mitigate the appellant's guilt.

The appellant agreed that he would not testify at either stage of the trial. The appellant told his attorney that he could not control his anger toward the prosecuting attorneys. Defense counsel discussed at length on

different occasions the question as to whether the appellant should testify and it was his informed decision not to testify.

FAILURE TO MAKE FINAL ARGUMENT AT THE SENTENCING PHASE

The appellant contends that counsel's performance was deficient because he failed to make a final argument pleading for the petitioner's life at the sentencing phase. The trial judge found that counsel deliberately waived final argument as a tactic.

One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastating closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffective assistance. See *State v. Martin, supra.*

The question of what witnesses to use and whether to waive final argument are tactical questions upon which competent lawyers might disagree. It cannot be said that incompetent representation had occurred merely because other lawyers, judging from hindsight, might have made a better or different choice of tactics. *Hellard v. State,* 629 S.W.2d 4, 12 (Tenn.1982); *Martin v. State, supra.*

The trial court found the factual issues in favor of the State and found that trial counsel was not ineffective. The Court's factual findings are binding on this court unless the evidence preponderates against them. *Graves v. State,*

512 S.W.2d 603, 604 (Tenn.Crim.App.1973). The evidence does not preponderate against the trial court's findings.

Trial counsel made a diligent and thorough investigation of the facts and the law. Although the appellant was without funds, trial counsel was able to procure a defense team composed of himself, a research expert, medical experts, and an investigator. No stone was left unturned in the preparation of the appellant's defense. Trial counsel was very conscientious in representing the appellant and placed much thought and effort into the tactical aspects of this case. However, trial counsel's work and diligence could not remove the overwhelming evidence against the appellant, both on the factual issue and insanity issue. In our view, the findings of guilt and the imposition of the death penalty were based upon the facts and the law – not by shortcomings of counsel.

We agree with the trial judge that trial counsel met the standard required by *Baxter v. Rose,* 523 S.W.2d 930 (Tenn.1975).

The judgment of the trial court is affirmed.

/s/ Lloyd Tatum
LLOYD TATUM, SPECIAL JUDGE

CONCUR:

/s/ Robert K. Dwyer
ROBERT K. DWYER, JUDGE

/s/ Jerry Scott
JERRY SCOTT, JUDGE

99-5279

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY BRADFORD CONE, Petitioner-Appellant, v. RICKY BELL, WARDEN, RIVERBEND MAXIMUM SECURITY INSTITUTION, Respondent-Appellee.	)	ORDER (Filed Jun. 01, 2001)

BEFORE: MERRITT, RYAN, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk *In*

IN THE CRIMINAL COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE

STATE OF TENNESSEE, Appellee, v. GARY BRADFORD CONE, also known as "Gerald Mason Harmon", Appellant.	)	Cases Nos. 74902 74898 74899 74900 74702 74703 38171

(Filed Jan. 28, 1983)

TRANSCRIPT OF THE EVIDENCE

VOLUME 20 OF 22 VOLUMES

BEFORE: THE HONORABLE JAMES C. BEASLEY, PRESIDING JUDGE

APPEARANCES

FOR THE APPELLEE:

Mr. Don D. Strother
Mr. Joseph L. Patterson
Assistant Attorneys General
Shelby County Attorney General's Office
201 Poplar Avenue, 3rd Floor
Memphis, Tennessee 38103

FOR THE APPELLANT:

Mr. John Dice
Mrs. April Ferguson
Attorneys at Law
66 North Second Street
Memphis, Tennessee 38103

* * *

[2115] MR. DICE: May it please the Court, and ladies and gentlemen of the jury: We talked about on the opening statement before about what the procedure in this courtroom would be if we got to this stage in the trial. I think all of us are fairly well familiar with that.

So, just as a brief refresher on that, as General Strother says, in this stage – the State is entitled to opening and the Defense is. Proof can be put on by either side as to aggravating and mitigating circumstances, and then after that is done the State has the right of making a closing argument, and so does the Defense.

What we're going to do in this particular phase of the case, as I've said to you all in the beginning of this trial, is that we will deal in death, or, we will deal in life. That is exactly where we are, and certain circumstances are going to be pointed out to you.

I agree with the General that the proof – I believe His Honor will tell you that was presented in the main portion of this case can be considered by you in considering both aggravating and mitigating circumstances. I'd [sic] also would make these comments in regards to that.

The Defense read to you what mitigating circumstances were present. The Defense has put on proof of those mitigating circumstances during its case, and I would like to review those with you.

[2116] We say that the mitigating circumstances which will apply in this particular case are as follows:

We say that the murder involved in this particular case was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

We say that because Dr. Jaremko testified that in his opinion – and I realize there's been conflicting testimony – that he was suffering from a psychosis that continues until present. In his case, Vietnam Veteran's Stress Syndrome. From the standpoint of Dr. Lipman, of what he called Amphetamine Psychosis. Dr. Bursten, of course, had his opinion. Dr. Hutson had his opinion.

We also say that the mitigating circumstance of the Defendant acting under the extreme duress in this particular case can be considered by you, as follows.

That the Court will charge to you that one of the mitigating circumstances which can be considered by you in a case of this nature is whether:

> " – The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment. –

[2117] And in going back at that, there's been a lot of issues brought up before all of you in terms of whether or not my client is the junkie and drug addict that we say he is.

And the General said that he'll prove that my client was incarcerated for three robberies in Oklahoma, and I guess he'll present some further proof on that. I don't know. But if you remember, in considering this mitigating

circumstance and remembering the proof, when he was arrested in Pompano Beach, according to Agent Flynn, he was arrested robbing a drug store, seeking drugs, and according to Officer Roby, looking for syringes. And I suggest that you consider whether or not that action is the action of an addict looking for his source of supply.

And I again ask you to consider that particular mitigating circumstance in looking at this – weighing and balancing of the mitigating circumstances.

I suggest to you that Dr. Jaremko stated, in his interview with my client, my client has expressed remorse for his conduct. That is not a statutory mitigating circumstance, but it is a circumstance that you can consider, as the General says, under the rule.

And I asked all of you, each and every one of you, to look at the whole man in this case, when we began. And I suggest to you that proof has been put in this record [2118] that he is an honorably discharged veteran of his country, and I ask you to look at that in light that there is no evidence of any kind, of any nature, in this record, other than the fact that his drug abuse began under the stress and strain of combat service. And I suggest to you that that is a mitigating circumstance.

Yesterday, during the heat of battle, General Strother referred to my client as an animal. Now, we're in the position here on opening statement of talking about the alternatives that are available. I suggest to all of you that we are not animals in this jury box, and I suggest to you that animals do not kill if there is an alternative. And there is good reason for maintaining life if you look at the whole man in this particular case.

The position that we're in, perhaps again, our ethics have been questioned, the Defense team. If we're unethical to seek mercy, then I am unethical. But mercy is – it's a double blessing. It's a blessing to the person who gives, and it's a blessing to the person who receives. And I would say to you that mercy – if you consider life under the mitigating circumstances, and the aggravating circumstances in this case – raises you above the State, raised you above the King, if you will. It raises you to the level of God.

And I ask you to consider all of those facts as [2119] you decide whether or not you will kill Gary Cone. Now, under the proof, perhaps, the theory of the State will be that Gary Cone has put himself in this position. But I submit to you there are victims in this case called the Todds, a fine elderly couple. there is also a victim in this case, of society, named Gary Cone. Thank you.

THE COURT: You may call the first witness.

MR. PATTERSON: James A. Blackwell, please.

STATE'S PROOF

J. A. BLACKWELL, called as a witness by the State, and after first having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PATTERSON:

Q. State your name for the Court and jury, and spell your last name for the record, please.

* * *